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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

VERN T. WEISS, *et al.*,

Petitioners,

v.

STATE OF ALASKA, *et al.*,

Respondents,

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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APPENDIX

to

WEISS, *et al.*, Petitioners

v.

STATE OF ALASKA, *et al.*, Respondents

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Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, telephone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

VERN T. WEISS, father and next friend of CARL WEISS, on behalf of himself and all others similarly situated; and MARY C. NANUWAK and BILLY R. CROSS, on behalf of themselves and all others similarly situated,

Appellants,

v.

STATE OF ALASKA, ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Appellees.

Supreme Court No. S-6845
Superior Court No. 4FA-82-2208 CI

OPINION

[No. 4816 - May 2, 1997]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Mary E. Greene, Judge

Appearances: David T. Walker, Law Offices of David T. Walker, Juneau, and James B. Gottstein and Bruce A. Moore, Law Offices of James B. Gottstein, Anchorage, for Appellants. Brian D. Bjorkquist and Nathaniel B. Atwood, Assistant Attorneys General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, Julian L. Mason and William S. Cummings, Ashburn & Mason, Anchorage, and G. Thomas Koester, Law Office of Thomas Koester, Juneau, for Appellee State of Alaska. James H. Parker, Disability Law Center of Alaska, Anchorage, for Appellees Bosel, Doulin, Goodwin and Mayoc. Philip R. Volland, Rice, Volland, Taylor & Hensley, P.C., Anchorage, for Appellees H.L., M.K. and Alaska Addiction Rehabilitation Services.

Before: Compton, Chief Justice, Rabinowitz, Eastaugh, and Fabe, Justices. [Matthews, Justice, not participating.]

FABE, Justice.

I. INTRODUCTION

Vern T. Weiss et al.[1] (Weiss) appeal from the superior court's approval of an agreement settling a class action lawsuit concerning the lands granted to Alaska under the Alaska Mental Health Enabling Act, Pub. L. No. 84-830, § 202, 70 Stat. 709, 711-712 (1956) (AMHEA). The settlement agreement, reached after almost a decade of negotiations, reconstitutes the trust with

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[1] Mary C. Nanuwak also joins this appeal. Billy R. Cross appeals from the superior court's denial of a motion to substitute him as a named plaintiff-intervenor for John Martin after Martin died in 1994.

land and cash and establishes institutional mechanisms to protect the trust and improve mental health programs. For the reasons set forth below, we conclude that the superior court did not err in determining that the agreement represents a fair, adequate, and reasonable settlement of this litigation.

II. FACTS AND PROCEEDINGS

A. The 1956 Act, the Redesignation Legislation, and *State v. Weiss*

We summarized the facts and proceedings in this case prior to 1985 in State v. Weiss, 706 P.2d 681 (Alaska 1985):

> In 1956 the United States Congress passed the Alaska Mental Health Enabling Act (AMHEA) which, insofar as it concerns this case, granted the Territory of Alaska one million acres of federal land to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska. Pub. L. No. 84-830, 70 Stat. 709 (1956). Section 202(e) of the Act specifically provides:
>
> > All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased,

> mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

The state managed these lands without maintaining a separate account until 1978. The Alaska State Legislature made its practice law in 1978 when it passed the following statutory provision:

REDESIGNATION AND DISPOSAL OF MENTAL HEALTH LAND

> (a) Land granted to the state under the Mental Health Enabling Act of 1956, 70 Stat. 709, and patented to or approved for patent to the state on July 1, 1978 and land designated as mental health land which was received by the state in exchange for land granted under that federal land grant is redesignated as general grant land and shall be managed and disposed of by the Department of Natural Resources under applicable provisions of law.

Ch. 181, § 3(a), SLA (1978).

Alaska has provided continuous mental health care since statehood. . . .

> Weiss et al. filed a class action in 1982 alleging that the state breached the public trust by 1) failing to account for revenues realized, 2) using revenues for purposes other than mental health care and 3) passing legislation redesignating the property "general grant land." Plaintiffs sought declaratory relief invalidating the redesignation legislation; injunctive relief compelling the state to administer the trust according to the law; general relief establishing a trust account "for the receipt of funds generated from all lands selected by the State of Alaska under the aforesaid mental health land grant. . . ."

State v. Weiss, 706 P.2d at 681-82.

The superior court agreed with plaintiffs that the State breached its duties as trustee by removing the federal grant lands from the trust. Id. at 682. However, the trial court ruled that it could not invalidate the 1978 redesignation legislation. Id. Instead, it ordered the State to pay fair market value and interest for all lands conveyed from the trust, including the lands redesignated general grant lands. Id. The superior court also ordered a set-off against this payment "for all monies spent by the state on mental health care." Id.

On appeal, we affirmed the lower court's ruling that Congress created a trust under the AMHEA and that the State breached its duties as trustee. Id. at 683. As a remedy for this breach, we invalidated the redesignation legislation and remanded the case to the trial court to reconstitute the trust "to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." Id. at 684. We also provided the trial court with the following guidance:

> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have

> been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

Id. at 684. We left open, however, "questions regarding the title held by conveyancees and bona fide purchasers of mental health lands." Id. at 684 n.4.

At the time of our decision in Weiss, only about thirty-five percent of the original trust land remained in state ownership and unencumbered. The State had conveyed about 90,000 acres to private individuals and municipalities and had designated more than 350,000 acres for parks, forests, wildlife areas, and similar uses.

Upon remand, we permitted the Alaska Mental Health Association (AMHA) et al.[2] (collectively, AMHA Intervenors) to intervene. The AMHA Intervenors added claims seeking to invalidate many of the State's conveyances of trust land to third parties.

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[2] Mary C. Nanuwak and John Martin joined AMHA's complaint.

B. Chapter 48 and Chapter 210

The legislature established the Interim Mental Health Trust Commission (Trust Commission) in 1986. Ch. 132, SLA 1986. It gave the Trust Commission the power to approve proposals for the sale, lease, or exchange of mental health trust land and to make recommendations for resolving the litigation. See Ch. 132, §§ 2(c), 4, SLA 1986.

One year later, based on discussions among all parties, the legislature attempted to settle the litigation by adopting Chapter 48, SLA 1987 (Chapter 48). Chapter 48 directed the commissioner of natural resources to establish the fair market value of the original trust lands under procedures approved by the Trust Commission. Ch. 48, § 4(a), SLA 1987. Once the Trust Commission established the fair market value of the lands, the commissioner, with the approval of the Trust Commission, was to select a combination of original trust lands and lands within legislatively designated areas with a fair market value equal to that of the original trust. Ch. 48, § 4, SLA 1987. The State would then compensate the trust for its use of these lands by paying it a "rent" of eight percent of the fair market value. Ch. 48, § 2, SLA 1987. Chapter 48 also provided that, until the fair market value of the trust land was established, the State would pay the trust five percent of unrestricted general fund revenues annually. Ch. 48, § 11, SLA 1987. Finally, the legislation created the Alaska Mental Health Board to determine the needs of persons to be served by the mental health program and to transmit recommendations for services and funding to the governor and legislature. See Ch. 48, § 6, SLA 1987.

During enactment of Chapter 48, other plaintiff groups moved to intervene in the action. The superior court permitted

Anita Bosel et al.[3] (Bosel Intervenors) to intervene on behalf of developmentally disabled individuals,[4] and H.L. et al.[5] (H.L. Intervenors) to intervene on behalf of chronic alcoholics with psychoses. AMHA and Weiss opposed the addition of the Bosel Intervenors. After an examination of the legislative history of the AMHEA, the superior court in 1988 concluded that Congress intended to benefit developmentally disabled individuals as well as those suffering from a psychiatric illness who may require hospitalization (Beneficiary Decision). The superior court also concluded that beneficiaries of the trust included chronic alcoholics suffering from psychoses and senile individuals who suffer major mental illnesses as a result of their senility.

In December 1989 two of the three members of the Trust Commission estimated the fair market value of the original trust lands to be $2.243 billion. The third member, the delegate of the commissioner of natural resources, rejected this figure and estimated the value of the original trust lands to be about $565 million. In response to these conflicting valuations, the commissioner of natural resources declared an "impasse" and refused to implement Chapter 48. In 1990 the legislature enacted a different proposal under which the State would pay six percent of unrestricted general fund revenues annually to the trust. Ch. 210, § 2, SLA 1990. This solution, which avoided the issue of the fair market value for the original trust land, foundered due to opposition by plaintiffs who feared revenues would fall.

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[3] Frances Doulin, Sharon Goodwin, and Gabriel Mayoc also joined in Bosel's complaint.

[4] We use the term "developmentally disabled" to refer to those individuals labeled "mentally retarded" and "mentally defective" in early versions of the AMHEA and in the record.

[5] M.K. and Alaska Addiction Rehabilitation Services joined in H.L.'s motion to intervene.

During this period of negotiations, the State continued to convey original trust land. However, after the failure of Chapter 48, the plaintiffs obtained a preliminary injunction prohibiting the State from transferring trust lands or any interest in trust lands pending final resolution of the litigation. In addition, the plaintiffs refiled lis pendens on all original trust lands.[6] The injunction and lis pendens affected thousands of land transactions.

C. Chapter 66

At the end of the 1991 legislative session, the legislature again attempted to settle the litigation by enacting Chapter 66, SLA 1991 (Chapter 66). Chapter 66 established a procedure to reconstitute the mental health land trust entirely through a land exchange. Under its provisions, the trust would retain much of its original holdings, and plaintiffs would be allowed to nominate replacement land of equal value from other state land. Chapter 66 also created a new agency, the Alaska Mental Health Trust Authority (Trust Authority), to act as trustee. Ch. 66, § 10, SLA 1991. The proposed settlement incorporating Chapter 66 was signed by the State and three of the four attorneys representing the plaintiffs, but the legality of the settlement was challenged by intervenors representing development and environmental interests. In addition, the H.L. Intervenors opposed the settlement, alleging improprieties in the negotiations.[7]

On December 30, 1993, the superior court denied preliminary approval of the Chapter 66 settlement. The superior court found that, because "either party may terminate the agreement at any time for any reason," the settlement was

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[6] The plaintiffs originally filed a notice of lis pendens on all original trust land prior to our decision in Weiss. This notice was expunged by the superior court on November 15, 1984.

[7] Although the Bosel Intervenors joined the agreement, they later withdrew their support.

seriously deficient and could not be approved without modification. Following this ruling, the State informed the parties that it did "not intend to implement the reconstitution provisions of Chapter 66." Instead, the State moved forward with a new approach to ending the litigation.

D. HB 201

After renewed negotiations between the parties, the legislature enacted the core of the settlement now before us in a special session following the regular 1994 legislative session. Ch. 5, 6, FSSLA 1994. Known as HB 201, the legislation returned about 568,000 acres of original land to the trust and designated approximately 353,000 acres of other state land as substitute trust land. The reconstituted trust now includes about 435,000 acres held in fee, 55,000 acres of mineral estate, and 78,500 acres of oil and gas interests from the original trust corpus. Other state land placed in the trust includes 111,000 acres held in fee, 217,000 acres of mineral estate, and 25,000 acres of oil and gas interests. The entire reconstituted trust consists of about 930,000 acres.

HB 201 provides for a special unit in the Department of Natural Resources (DNR) to manage trust land. AS 44.37.050. The settlement requires DNR to manage the land "consistent with the trust principles imposed on the state" by the AMHEA. AS 38.05.801. In addition, DNR must manage the land "under those provisions of law applicable to other state land" and adopt regulations that "at a minimum" address: "(1) maintenance of the trust land base; (2) management for the benefit of the trust; (3) management for long-term sustained yield of products from the land; and (4) management for multiple use of trust land." AS 38.05.801(c).

The settlement also provided for a payment by the State of $200 million in cash. Ch. 6, FSSLA 1994. This cash payment, proceeds from the sale of trust land, and other proceeds attributable to principal are retained perpetually in the mental

health trust fund and invested by the Alaska Permanent Fund Corporation. AS 37.14.031-.035. The income from the fund, the land, and other assets is deposited in the mental health trust settlement income account. AS 37.14.036. The Trust Authority may use this income account to award grants and contracts to ensure an integrated mental health program, obtain grants and gifts for that purpose, pay the Department of Natural Resources and the Alaska Permanent Fund Corporation for managing trust assets, offset the effect of inflation on the value of the principal of the trust, and pay its administrative expenses. AS 37.14.041.

HB 201 also requires the Trust Authority to make recommendations on mental health spending to the governor and legislature. AS 47.30.046. The appropriation bill submitted by the governor and the appropriation bill passed by the legislature must be limited to the mental health program. AS 37.14.003(a) & .005(b). The bills must be accompanied by reports explaining any differences between the appropriations they contain and the Trust Authority's recommendations. AS 37.14.003(b) & .005(c). In addition, the governor must explain any vetoes of appropriations for the mental health program "in light of" the Trust Authority's recommendations. AS 37.14.003(c).

The legislature made portions of the settlement contingent on dismissal of the litigation on or before December 15, 1994. Ch. 5, §§ 48-51, FSSLA 1994. If the superior court had not approved the settlement and dismissed the suit on or before that date, the trust would have been reconstituted with only the lands included in the settlement agreement; the provisions for payment of $200 million, establishment of the Trust Authority, and the special budgeting procedures would not have taken effect. Id.

The State and the H.L. and Bosel Intervenors (collectively, Proponents) supported HB 201, while the AMHA Intervenors and Weiss opposed it. After a four-day evidentiary hearing, the superior court gave preliminary approval to the HB 201 settlement on July 29, 1994.

In granting preliminary approval, the superior court noted several problems with the settlement that might have precluded final approval. Some of these were addressed by a second special session of the legislature. Chs. 1-2, SSSLA 1994. The legislature amended the settlement to allow for the provisions of HB 201 to go into effect even if some members of the class appealed final approval after the December 1994 deadline. Ch. 1, § 2, SSSLA 1994. It also modified the list of lands incorporated into HB 201 to avoid title problems and include more valuable lands. Ch. 1, §§ 4-7, SSSLA 1994. Finally, it gave assurance that the trust would receive the full $200 million in cash even if the State could not sell certain lands for the amount stated in the legislation. Ch. 2, §§ 4-5, SSSLA 1994.

After reviewing comments and conducting another evidentiary hearing on the fairness of the settlement, the superior court issued final approval of the HB 201 settlement on December 6, 1994. Weiss appeals.[8]

III. DISCUSSION

A. Standard of Review

In reviewing the superior court's approval of a class action settlement pursuant to Alaska Rule of Civil Procedure 23(e),[9] we adopt the same abuse of discretion standard applied under the federal rule, 7B Charles A. Wright et al., Federal

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[8] Earl Hilliker, an original plaintiff, and AMHA opposed the settlement but are not participating in this appeal.

[9] Rule 23(e) provides:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Practice and Procedure § 1797.1, at 394 (1986), and in our previous cases concerning settlement agreements. E.g. Barber v. Barber, 837 P.2d 714, 716 n.2 (Alaska 1992). We review the superior court's findings of fact under the clearly erroneous standard. Id.

B. Did the Superior Court Err in Ruling that the Settlement Agreement Is Fair, Adequate, and Reasonable?

In granting final approval, the superior court properly focused on determining whether the settlement as a whole was fair, adequate, and reasonable. The superior court listed seven factors to consider in making this determination:

> (1) comparison between the likely result of litigation and the remedy in the settlement;
>
> (2) expense, complexity, and likely duration of further litigation;
>
> (3) reaction of the class to the settlement, number of objectors, and nature of objections;
>
> (4) experience and views of counsel;
>
> (5) defendant's ability to pay (feasibility of settlement);
>
> (6) extent of discovery completed; and
>
> (7) presence of collusion in settlement negotiations.

This list of factors, drawn from federal precedent, provides a framework for thorough analysis. See Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992); Manual for Complex Litigation, Third § 30.42 (1995); 2 Herbert B.

Newberg & Alba Conte, Newberg on Class Actions § 11.43, at 11-97 (3d ed. 1992).

The bulk of Weiss's arguments concern the fairness of the settlement; he argues, in short, that it is a "bad deal." As the United States Supreme Court has stated, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement."[10] Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). Thus, the focus of Weiss's challenge is the superior court's analysis under the first factor above: the comparison between the likely result of litigation and the remedy in the settlement. In making this comparison, a court should attempt to determine

> a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion - and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972).[11]

The superior court determined that the HB 201 settlement "provide[d] the class with five primary benefits." These included

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[10] In addition, neither the superior court in considering the settlement nor this court in reviewing it "decide[s] the merits of the case or resolve unsettled legal questions." Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981).

[11] We remanded for an equivalent analysis in an appeal involving the proposed settlement of the claims of a minor under Alaska Civil Rule 90.2. In re Estate of Brandon, 902 P.2d 1299, 1310 (Alaska 1995).

reconstitution of the trust with $1.1 billion of original and replacement land, payment of $200 million, establishment of the Trust Authority, alteration of the budgeting process, and creation of a special DNR unit to manage trust land.[12] The superior court compared these benefits to what it determined would be the likely result of continued litigation: a trust composed solely of between $1.2 and $1.5 billion worth of land. It reasoned that, because the set-off for the State's mental health expenditures permitted under Weiss would probably exceed the value of the payment for lands removed from the trust, further litigation would not result in any cash payment to the trust. It also concluded that continued litigation would not result in any Program Benefits.

Weiss challenges this comparison, arguing in essence that the superior court erred both by overvaluing the settlement and undervaluing the probable outcome of continued litigation.

1. Land value

The settlement provides for the trust to be reconstituted with both original trust land and substitute land. The superior court, for purposes of comparison, valued the combination of original trust land and substitute land in the HB 201 settlement at $1.1 billion. The court then compared this value with the value of the original trust lands without the land that would probably not be returned to the trust after further litigation. Considering the outcomes of both highly successful and unsuccessful litigation, the superior court determined that the value of the land returned to the trust after final judgment would be between $1.16 billion and $1.53 billion.

Weiss argues that the superior court erred in two general ways: (a) it undervalued original trust land and overvalued

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[12] The latter three are referred to collectively as the "Program Benefits."

settlement land; and (b) it incorrectly assessed the risks of further litigation. The former involves primarily issues of fact regarding the various efforts to appraise the value of the lands at issue, while the latter centers on the nature of the trust established by the AMHEA.

a. Value of original trust and settlement lands

Weiss's arguments concerning the valuation of the original trust lands focus on the mineral values of those lands.[13] The starting point for the superior court's consideration of the mineral values was the testimony of Weiss's expert, Dr. Paul Metz. Dr. Metz estimated the mineralized lands to be worth between $1.3 and $1.5 billion, exclusive of coal and industrial minerals. The Proponents attacked this estimate through the testimony of four expert witnesses. Applying their "corrections" to Dr. Metz's work, these witnesses testified that the value of the mineral portion of the original trust lands was between $80 and $119 million, or approximately ten percent of Dr. Metz's estimate.

Considering this conflicting testimony, the superior court found that Dr. Metz "overstate[d] the true value of the mineral lands." It concluded that, although the settlement land "is not as valuable as the original mental health trust," the difference in value suggested by Dr. Metz's appraisal was not "a real dollar loss." This conclusion undercut Weiss's position in two ways.

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[13] Weiss also contends that the superior court erred in valuing the surface value of original trust lands by considering that "the time required to sell surface value original trust lands (called 'absorption') reduced the value to as much as one-tenth to one-fifth of [the lands'] stated value." The superior court, however, did not apply absorption or discount rates when establishing the value of original trust lands; it used the valuation of the land provided by Weiss's expert. Thus, this argument is irrelevant.

First, it suggested that the other benefits of the settlement, such as the $200 million in cash and the establishment of the Trust Authority, would be adequate compensation for land not returned to the trust. Second, it supported the superior court's conclusion that Weiss faced a "very high litigation risk" of proving that the State owed as much as he claimed for the lands it removed from the trust.

Weiss faults the superior court for failing to provide sufficient analysis of the expert testimony on mineral valuation and for ignoring rebuttal testimony. This argument is unpersuasive. The superior court specifically explained the analysis of each of the four experts critical of Dr. Metz's methodology. It also noted several of Dr. Metz's arguments in rebuttal. Contrary to Weiss's argument, the trial court's decision provides "a clear understanding of the ground on which the trial court reached its decision," Sloan v. Jefferson, 758 P.2d 81, 86 (Alaska 1988), and reflects a detailed analysis of both sides of the valuation issue.

Weiss also argues that the superior court erred by not accepting Dr. Metz's appraisal of the original trust lands. This argument fails for two reasons. First, the trial court in fact largely adopted Weiss's estimates in making its comparison between the settlement and the probable result of continued litigation, explicitly stating that the "valuations given by Dr. Metz are useful when comparing two groups of mineralized land." Second, a trial court does not err simply by finding the testimony of one witness more convincing than that of another. Evans v. Evans, 869 P.2d 478, 480-81 (Alaska 1994).

In arguing that the superior court overvalued the settlement lands, Weiss contends that, because only land "no one maintained an objection to was included" in the settlement, the "posited surface values should . . . be reduced" to a fraction of their stated value. However, Weiss never argued and no witness testified to the trial court that such a reduction should be applied only to lands included in the settlement. Thus the trial court did

not err by failing to reduce the value of the land as Weiss suggests.

b. Risks of continued litigation

In assessing the likely result of continued litigation with regard to land, the superior court divided the land in the original trust into categories and assigned each category a "litigation risk."[14] The categories in dispute are: (i) land held by third-party purchasers; (ii) municipality entitlements; (iii) legislatively designated areas (LDAs) and lands transferred to other state agencies; and (iv) pre-1978 disposals.[15]

i. Third-party purchasers

The superior court concluded that the litigation risk of recovering land purchased by third parties would be very high. It reasoned that the land conveyed to third parties would probably be considered "sold" under Weiss. It also determined that, because most of the purchasers did not buy the land with knowledge of the breach of trust, these sales would probably be

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[14] In evaluating this risk, the superior court focused on the probability that plaintiffs would be able to recover the land removed from the trust through further litigation. Under Weiss, the State would be liable to the trust for the fair market value of "sold" lands. Weiss, 706 P.2d at 684. As discussed below, however, any payment by the State for "sold" lands would be subject to the "set-off." Id. Therefore we, like the superior court, address the likely amount of such payment in connection with our discussion of the set-off and focus here on the likelihood that the trust would recover its original land grant.

[15] The superior court also determined that the litigation risk of recovering trust lands exchanged with the Cook Inlet Region Incorporated was "low." The parties do not dispute this finding. The superior court also briefly considered original trust lands that currently generate about $1 million a year in revenue from coal leases, concluding that these lands would "clearly return" to the trust in continued litigation.

upheld under basic principles of trust law.[16] The trial court further noted that such purchasers might also raise other valid defenses, such as the statute of limitations.

Weiss argues that this analysis is incorrect. He asserts that under "a long-standing per se rule . . . conveyances of federal trust lands in breach of trust are void, regardless of the actual state of knowledge of the conveyees." Weiss supports this position by citing cases from Nebraska and Arizona dealing with land granted by Congress to states for the purpose of supporting public schools.

This argument is not persuasive. The trial court reasonably interpreted Weiss as supporting the view that land transferred to third parties would be considered "sold" for purposes of reconstituting the trust. It also did not err in concluding that under the bona fide purchaser doctrine many if not most of these sales would be valid because the purchasers had neither actual nor constructive notice of any breach of trust.

Precedent relied on by Weiss involving school land trusts in Nebraska and Arizona does not contradict this conclusion. The holdings in those cases rely on the detailed procedures for disposal of trust land contained in the enabling acts and state constitutional provisions governing those land trusts. E.g. Gladden Farms, Inc. v. State, 633 P.2d 325, 327-30 (Ariz.

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[16] The superior court cited Restatement (Second) of Trusts § 284 (1959), which states:

> (1) If the trustee in breach of trust transfers trust property to, or creates a legal interest in the subject matter of the trust in, a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction, the latter holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary.
>
> (2) In the Restatement of this Subject such a transferee is called a "bona fide purchaser."

1981); Murphy v. State, 181 P.2d 336, 353-54 (Ariz. 1947); State ex rel. Ebke v. Board of Educ. Lands & Funds, 47 N.W.2d 520, 522-23 (Neb. 1951). The AMHEA differs from these laws because it explicitly permits trust lands to "be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide." AMHEA § 202; see also State v. University of Alaska, 624 P.2d 807, 815 n.11 (Alaska 1981) (noting that the Nebraska Constitution specifically provides for a method of management and disposal of school lands, while the Alaska Constitution "has left these determinations to the legislature"). While we noted in Weiss that precedent involving school trust land supported our reliance on "basic trust law principles," Weiss, 706 P.2d at 683 n.3, this reliance does not imply that application of such principles yields the same result regardless of the nature of the trust at issue. The superior court properly applied basic principles of trust law under the specific terms of the AMHEA to determine that the plaintiffs would face a high risk of recovering land conveyed to many third-party purchasers.

ii. LDAs and land transferred to other state agencies

The superior court estimated that the litigation risk that the trust will recover land set aside by the legislature for other uses since 1978 would be "high." The court based this conclusion on its determination that, in accord with State v. University of Alaska, 624 P.2d 807 (Alaska 1981), these lands would probably be deemed "sold" under Weiss. Weiss argues that the term "sold" in Weiss does not refer to lands "still held by the State."

In University of Alaska, we considered a 1929 grant of 100,000 acres by the federal government to the Territory of Alaska for the "exclusive use and benefit" of the University of Alaska. 624 P.2d at 810-11. The State, without paying compensation, placed about 5,000 acres of the land into Chugach State Park. Id. at 809-10. We concluded that the State breached

the trust by redesignating the land, but declined to invalidate the State's action. Id. at 814-15. Instead, we held that the State must compensate the university for the land by paying it fair market value or by agreeing to a land exchange. Id. at 816.

In Weiss, we distinguished University of Alaska on the grounds that the 1978 redesignation legislation did "not involve a disposition of a portion of trust lands for a specific use" and therefore could not support an inference of legislative intent to pay for the trust land. Weiss, 706 P.2d at 684. However, unlike the 1978 redesignation legislation, the State's transfer of land to legislatively designated areas or for the use of state agencies is "a disposition of . . . trust lands for a specific use." Id. The State's action with respect to such land is thus similar to the action permitted under University of Alaska. The superior court therefore reasonably concluded that, under that case, the plaintiffs would face a high risk of not recovering this land through further litigation.

iii. Municipal entitlements

The superior court evaluated the litigation risk associated with recovery of original trust lands selected by municipalities under the municipality entitlement program, AS 29.65, as "medium." It based this conclusion partly on its evaluation of the argument that the transfers would be upheld under University of Alaska and partly on the fact that many of the lands have been resold to individuals who may be bona fide purchasers. Weiss argues that this finding is contradicted by City of Sierra Vista v. Babbit, 633 P.2d 333, 334 (Ariz. 1981), in which a sale of school trust land to a municipality was invalidated.[17] In contrast to the

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[17] Weiss also argues that the municipalities could not claim bona fide purchaser status since they did not pay value for the land. This argument, even if true, is irrelevant because the court did not base its finding on the bona fide purchaser status of the municipalities.

case before us, however, City of Sierra Vista relies on the specific requirement in the Arizona Enabling Act that school trust lands be sold to the "highest and best bidder." Id. Therefore, Weiss's reliance on this case is misplaced.

Weiss also argues that the superior court erred by including sales by municipalities to third-party purchasers in this category because those sales had already been considered by the court in its specific discussion of sales to third-party purchasers. However, the superior court's finding that the plaintiffs face a "medium" risk of recovering municipal entitlement lands through continued litigation is amply supported by University of Alaska regardless of whether such lands were resold to third parties.

iv. Pre-1978 disposals

The superior court evaluated the plaintiffs' risk of recovering lands disposed of prior to the 1978 redesignation legislation as "very high." The court reasoned that because "[n]othing in Weiss would require that they be included in the reconstituted trust,"[18] the "plaintiffs would have to prove a breach of trust or other invalidity other than the enactment of the redesignation legislation." It concluded that, under University of Alaska and the legislature's power under the AMHEA to dispose of trust lands, the plaintiffs would be unlikely to succeed in forcing the State to return this land. Weiss contends that the plaintiffs would have little difficulty in establishing that the pre-1978 transfers were in breach of trust.

The lands disposed of prior to 1978 include both purchases by third parties and land designated for other uses. As discussed above, the trial court reasonably found the risk of

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[18] We stated in Weiss that the goal on remand was "to restore the trust to its position just prior to the conveyance effected by the redesignation legislation." Weiss, 706 P.2d at 684.

recovering land in these two categories as "very high" and "high," respectively. This analysis applies with equal force to the pre-1978 disposals. Thus the superior court did not err in its evaluation of the risk with respect to recovering this category of land.

c. Summary of litigation risk with respect to land

In summary, the superior court did not err in concluding that the likely result of continued litigation would be a trust corpus including land worth between about $1.1 billion and $1.5 billion. Nor did the court err in estimating, for purposes of comparison, the value of settlement lands as about $1.1 billion. The superior court ably analyzed the complex land valuation issues in this case; its findings and conclusions are well supported by both the record and the relevant authority.

2. Cash

The superior court considered the settlement's $200 million "cash infusion" to be "extremely significant" because it assured "some income" for Trust Authority programs and because "it is real money in hand today." The trial court stated that "$200 million of mineral value may never produce $1 of income for the trust, because the mineral values are based on probabilities of discovery derived from extremely limited geophysical, geochemical, and geological data with no actual drilling." The superior court also stated that, based on calculations by an expert witness for the Proponents, $200 million in cash is equal to the net present value of the royalties from between $588 million and $6.3 billion in annual mineral production, depending on one's assumptions regarding cost of

production, discount rate, mine life, and delay in the start of production.[19]

Weiss complains that these comparisons led the trial court to overemphasize the value of the cash component of the settlement. He argues that the court's statement that $200 million in mineral value might not produce any income for the trust "represents a fundamental misunderstanding of the valuation process."

While Weiss is correct that mineral lands valued at $200 million could presumably be sold for $200 million "cash in hand," his argument misses the superior court's point that the capacity of the trust land to produce income is highly speculative. Contrary to Weiss's assertions, these comparisons and calculations were not presented as "one of the fundamental underpinnings" of the superior court's analysis, but merely as an "interesting" way to contrast the speculative value of the trust's land with the certain value of cash. The superior court did not err by observing this distinction or by illustrating it.[20]

3. The set-off

The issue of the set-off goes to the heart of the nature of the trust created by the AMHEA. In Weiss, we stated:

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[19] The $588 million figure is based on immediate production, a 10% discount rate, a mine life of 20 years, and a royalty payment of four percent of gross production. The $6.3 billion figure is based on a 10-year delay in production, a 20% discount rate, a mine life of 20 years, and a royalty stream of four percent of gross production.

[20] Weiss offers his own calculations purporting to show that the court's conclusions are "very far off the mark." These calculations, while mathematically correct, ignore the court's assumptions regarding start-up delay, discount rate, and mine life. Thus they do not provide a meaningful point of comparison.

> To the extent that former mental health lands have been sold since the date of the conveyance [redesignation legislation] the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution.

706 P.2d at 684. The superior court considered the "setoff . . . a very significant litigation risk" with the "potential to negate any cash recovery to the trust resulting from the State's obligation to pay for 'sold' land." It reasoned that neither we nor the United States Supreme Court would be likely to review and reverse our decision in Weiss. It also noted that the language of the AMHEA supports its assessment of the risk created by the set-off because it "appears to allow the proceeds of [land] sales to be used for the necessary expenses of the mental health program."

Weiss counters that our statement in Weiss allowing the set-off was merely the product of a dubious and unauthorized stipulation made by plaintiff's original counsel. Weiss argues that the making of such a stipulation amounted to "inadequate representation" by class counsel and that class members will therefore not be bound by the resulting settlement agreement.

Weiss's argument rests on the assumption that the set-off, at least as understood by the superior court, is an erroneous interpretation of Weiss and the AMHEA. Relying on our holding in Weiss that the State, by passage of the 1978 redesignation legislation, "breached its duty to preserve the corpus" of the trust, Weiss, 706 P.2d at 683, he concludes that we rejected the State's view that it had the power to spend trust principal to fund the mental health care program. He argues that the superior court should have interpreted Weiss as endorsing his position that

the State has a duty to preserve the trust corpus against "diminution."

We disagree. The AMHEA provides that trust lands "may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska." AMHEA § 202(e). The superior court reasonably interpreted this language as expressly permitting the State to fund mental health programs by selling trust assets. Thus the trial court did not err in reasoning that the AMHEA probably does not require that the State preserve the corpus of the trust in perpetuity. Nor is this reasoning contradicted by any duty under basic trust law principles. Trustees have a duty to preserve trust property for the uses of the trust,[21] but they do not necessarily have a duty to maintain the corpus of the trust forever.[22]

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[21] The Restatement (Second) of Trusts § 176 (1959), under the heading "Duty to Preserve the Trust Property," states: "The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." Comment b of § 176 further states that "[i]t is the duty of the trustee to use reasonable care to protect the trust property from loss or damage." Thus the duty to preserve the trust corpus does not prohibit the trustee from using the principal for the purposes of the trust. Indeed, trusts may allow the trustee to expend the principal of the trust for the support of the beneficiary, under specific terms of the trust, or at the trustee's discretion. See, e.g., Restatement (Second) of Trusts, §§ 153-55, 190 (1959).

[22] The school trust land cases do not compel a different result. As noted above, the enabling acts, constitutional provisions, and statutes governing many school trust lands, in contrast to the AMHEA, expressly require the state to preserve the corpus of the trust in an "'inviolate' permanent fund." Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 879 (1992). One possible benefit of the settlement is that it establishes such a permanent trust fund for the mental health trust. See AS 37.14.031. In view of the language of the AMHEA, it is unlikely that further litigation would achieve this result.

In light of the provisions of the AMHEA, general trust principles, and our approval of a set-off in Weiss, the superior court did not err in concluding that plaintiffs would face a significant risk that a set-off for the State's mental health expenditures "has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold.'"

4. The mismanagement claim

Weiss argues that even if the trial court correctly found that the set-off would exceed any cash recovery for lands removed from the trust, it erred by not adequately assessing the plaintiffs' claim against the State for damages from the State's alleged mismanagement of the trust. Weiss argues that, according to Restatement (Third) of Trusts, Prudent Investor Rule § 205 (1990), a trustee who commits a breach of trust is "chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Weiss concludes that the superior court erred by finding "significant risks" that damages from this mismanagement or "lost opportunity" claim would not exceed the set-off. He also argues that the superior

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Moreover, Weiss undercuts his own position that the State's duties with regard to the mental health trust are similar to the duties of other states toward school land trusts by arguing that the State breached its duty as trustee by failing to manage the trust's mineral lands so as to produce income to fund the mental health program. The use of royalties from nonrenewable resources to fund mental health programs would necessarily diminish the corpus of the trust. In recognition of this, states with school land trusts usually place mining royalties into permanent funds or use them to purchase additional trust land. See Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 879 (1992). Indeed, under the settlement agreement, "royalty proceeds" are placed in the permanent fund containing the trust's cash principal. AS 37.14.031(b)(2).

court abused its discretion by refusing to allow his expert to testify on the likely amount of mismanagement damages.

The superior court agreed with Weiss that "it is very likely that the plaintiffs could prove that the State mismanaged the trust." It found, however, that the plaintiffs would face significant risks both in proving damages in excess of the set-off and in overcoming potential legal defenses. This conclusion is well supported by both the relevant law and facts of this case. In this regard, the trial court stated:

> Lost opportunity damages are difficult to prove in any case unless there is an existing history of business activity or earnings. They would be extremely difficult to prove in this case.
>
> The most difficult area of proof concerns the mineral lands. Almost nothing is actually known about the mineral producing capacities of these lands. The lands were open for mineral development and staking for free from the time they were in state control until after the Supreme Court's decision in Weiss. Accordingly, the proof would center on what would have happened with proactive promotion of the lands. However, there is no appropriate comparative standard. Throughout this period no group in this state actively promoted mineral lands. Thus, it is hard to predict how the mineral industry would have reacted to active management. Even if the plaintiffs overcome this hurdle, they would have to prove how much money they would have earned from producing mines. Alaska has not had a very active metallic mineral industry, other than for the production of gold. There is a substantial risk that the plaintiffs would be left with speculative damages for which they could be awarded nothing.

> The easiest area to prove, lost opportunity damages concerning the surface lands, still poses litigation risks. There are proof problems there as well. The years from 1966 (when selections were largely completed) to 1978 were growth years for the state, but most of the growth occurred in the latter part of that period with the building of the Transalaska pipeline. The plaintiffs could have difficulty showing a market for lands before 1975.

The superior court also found that portions of the mismanagement claim were subject to several legal defenses putting "some if not all of the potential damages from the lost opportunity claim at risk." It noted that the plaintiffs either approved or did not object to many of the transactions between 1986 and 1990 approved by the Interim Mental Health Trust Commission. In addition, the preliminary injunction sought by plaintiffs has precluded the State from "permitting any activity on trust lands without court approval." Thus the trial court concluded that the State "could probably defeat most claims after 1986 based on waiver."

The superior court also found that the mismanagement claim might be barred by "limitations placed by the court on the intervention by AMHA." The mismanagement claim was added to this litigation by the complaint in intervention filed by AMHA after we issued our decision in Weiss. This court's order permitting AMHA's intervention stated that "counsel for AMHA declared its general satisfaction with the decision in Weiss, and its present desire only to participate in future proceedings in Weiss on the previously ordered remand thereof." Under this order, the trial court granted AMHA's request to file its complaint "only insofar as the Additional Claims relate directly to the reconstitution of the trust ordered by the Alaska Supreme Court" in Weiss. Referring to these orders permitting AMHA's intervention, the superior court stated that an "independent claim for damages may exceed that limitation." In light of this

analysis, we hold that the superior court did not err in its evaluation of the plaintiffs' mismanagement claim.

Weiss also argues that the trial court abused its discretion by refusing to allow Weiss's expert to testify on the likely amount of mismanagement damages. Our review of the transcript, however, reveals that the excluded testimony arose after a new attorney took over examination of the expert during direct testimony. As a condition for allowing the switch in attorneys, the court required the witness's further testimony to be within the scope of the prior testimony. The trial court did not abuse its discretion in ruling that the scope of the prior testimony did not include the calculation of damages due to the State's alleged mismanagement of the trust.

5. Program Benefits

In comparing the settlement with the likely result of continued litigation, the trial court considered three "primary benefits" in addition to land and cash. These benefits, collectively referred to as the "Program Benefits," include (a) the creation of the Trust Authority, (b) budgeting advantages for the mental health program, and (c) the management of trust land by a special unit within DNR. Weiss argues that the superior court overvalued each of these benefits.

a. The Trust Authority

The superior court found the Trust Authority to be a "fundamental and significant part" of the settlement agreement. Weiss argues that the benefit of the Trust Authority is largely "illusory" because its power to spend money from the trust income account without appropriation by the legislature is possibly unconstitutional. Weiss also contends that the power of the Trust Authority to oversee DNR's administration of trust lands is meaningless since DNR will have "the final say."

In granting both preliminary and final approval, the superior court recognized that the constitutionality of the Trust Authority's power to spend trust income without legislative appropriation was uncertain. Thus, contrary to Weiss's assertion, the superior court did not "just close its eyes" to this issue. Indeed, it would have been improper for the trial court to attempt to resolve this unsettled legal question. See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981). Furthermore, the court based its finding as to the significance of the Trust Authority on "all its powers and its advocacy position," not solely on its spending power.[23] Thus the superior court, even while acknowledging Weiss's argument, came to a different conclusion as to the Trust Authority's value; this conclusion was not clearly erroneous. Weiss's second argument also fails. Again, the superior court recognized and accounted for the fact that, although the Trust Authority has the power to disapprove proposed land exchanges, DNR will ultimately decide how to manage trust land. See AS 37.14.009(a)(2).

Moreover, the superior court responded to both of these arguments with the observation that, without the settlement there "would be no Trust Authority." Instead, the likely result of litigation would be "general directions to the State to manage the trust in the interests of the beneficiaries and under the Enabling Act." The superior court did not err in determining that management under the Trust Authority will probably be better than "management with those directions."

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[23] The superior court emphasized its view of the importance of the Trust Authority's "advocacy position":

> The Trust Authority, if it does its job, will serve as a watchdog to ensure that neither DNR nor the legislature mismanages these trust lands again. . . . [I]t is clear that the sometimes powerless have been empowered. The Trust Authority can be a powerful advocate for the real needs of those who have so much difficulty advocating for themselves.

b. Budgeting advantages

The superior court found that the budgeting procedures in HB 201, set forth at AS 47.30.046 and AS 37.14.003-.005,

> may prove to be significant as the budget for the integrated comprehensive mental health program competes with other needs for general fund appropriations. The mental health budget is given an advantage for inclusion in the governor's budget over the budgets of other state agencies. The mental health budget is given an advantage before the legislature both from its separation from other appropriations and in the required legislative report. Clearly, there are no guarantees of adequate funding or expanded funding for necessary services, but these budget advantages may prove to be significant nonetheless.

Weiss argues that the superior court erred in not quantifying the benefit of these "budgeting advantages." It would make little sense, however, to require the trial court to quantify the value of such terms; as the court recognized, their significance remains to be seen. However, like the Trust Authority, the budgeting advantages would almost certainly not be established through continued litigation. Therefore, the superior court did not err in considering these procedures a benefit, albeit of unknown value, to the class.

c. Land management

Weiss makes several interrelated arguments with regard to the land management provisions of the settlement agreement. First, he contends that the management regime is "illegal"

because it allegedly does not require trust lands to be managed "solely in the best interest of the beneficiaries." Weiss also asserts that the court erred by considering the "not very concrete" benefit of management of trust land by a special DNR unit.[24]

Weiss argues that the settlement's management scheme is illegal because it provides that DNR "shall manage mental health trust land under those provisions of law applicable to other state land." AS 38.05.801(b)(1). This argument is unconvincing. HB 201 explicitly makes this provision subject to the overall requirement that the lands "be managed consistent with the trust principles imposed" by the AMHEA. AS 38.05.801(a). In light of this express language, the trial court reasonably concluded that the settlement's management standard conforms with the requirements of the trust.

Weiss also argues that the management provisions are illegal because they require that DNR's regulations "address . . . management for multiple use of trust land." We agree with the superior court, however, that when "viewed in its entirety, there is actually no conflict" in the statute between the multiple-use subsection and the subsections requiring maintenance of the trust land base and management for the benefit of the trust and long-term sustained yield of products from the land. As the superior court noted, multiple use can refer to multiple types of development as well as to combining recreation or preservation with development.[25] Moreover, recognition of the "unique

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[24] Weiss also argues briefly that the superior court erred by not reducing the value of settlement land because of the settlement's management regime. This argument assumes that the State's management under the settlement will be different than the management resulting from continued litigation. As discussed below, the court did not err in refusing to accept this assumption.

[25] The law review article from which the management provisions adopted by HB 201 are derived reinforces the superior court's interpretation of the term "multiple use" in the context of state trust lands: "Management for multiple

scenic, paleontological, and archeological values" of trust lands is not necessarily incompatible with trust principles, even under the stringent rules governing school trust lands. National Parks & Conservation Ass'n v. Board of State Lands, 869 P.2d 909, 921 (Utah 1993).

Weiss also takes issue with the superior court's appraisal of the value of the settlement's creation of a separate unit within DNR to manage trust lands. The superior court found

> the addition of a special unit to manage these lands to be an improvement over general management by DNR for several reasons. First, the land managers in the special unit will have a smaller amount of land per person to manage than those in DNR. This should allow managers to be proactive managers instead of passive managers. Second, the special unit members can be trained in the special rules applicable to trust management and will have to apply only those rules and those laws applicable to other state lands which do not conflict with trust management under the Enabling Act. Third, the individuals in the special unit may develop a sense of pride in their special charge.

Even if, as Weiss asserts, the trial court's first point is not supported by evidence, the court's second and third points offer ample support for its conclusion that management by a

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uses on state trust lands varies from the common conception of multiple use as it is applied to federal lands. In the states' case, multiple uses must either contribute to the overall generation of revenues for the trust, must be revenue neutral, or must be funded by other sources." Sally K. Fairfax et al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 798, 905 (1992).

specialized unit will probably be an improvement over the result of continued litigation.

In summary, the program benefits at best offer a considerable advantage over continued litigation. At worst, they are as favorable as the likely product of continued litigation. Therefore, we hold that the superior court did not err in its appraisal of the settlement's provisions regarding the Trust Authority, the budgeting procedures, and land management.[26]

6. Enforceability

Weiss argues that the superior court erred in approving a settlement that "is not legally enforceable." The settlement agreement provides:

> By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, and acknowledge that the trust is reconstituted in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985). The provisions of . . . HB 201 . . . constitute material terms upon which the plaintiffs have agreed to a dismissal and acknowledged that the trust is reconstituted. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such

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[26] The superior court also noted that approval of the settlement eliminated the risk that the so-called "non-settlement provisions" of HB 201 would be upheld as "curative legislation" for the State's breach of the trust. If the superior court had not approved the settlement, the non-settlement provisions of HB 201 would have "reconstituted" the trust with the settlement lands but without the $200 million in cash, establishment of the Trust Authority, or enactment of the budgeting procedures.

> relief as may be appropriate in light of the plaintiffs' claims. In light of the dismissal of each parties' [sic] claims, no modification of this agreement may be made except in writing signed by all the parties. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

The superior court noted in its decision granting final approval that "nothing in HB 201, the Settlement Agreement, or this decision can prevent a future legislature from passing legislation affecting the trust, but there are remedy provisions if this happens and deterrents exist." The court stated that, in the event of such legislative action, the class can move for relief from judgment under Civil Rule 60(b)(6). The trial court also relied on the expectation that the Trust Authority, as an advocate for the trust, will

> actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority may also be in a position to influence the governor to veto any legislation which makes a material change in this settlement.

Finally, the trial court found that third parties, such as "purchasers of state land, hardrock miners, and oil companies . . . would undoubtedly lobby the legislature to maintain stability in land titles in order to avoid disrupting land development in Alaska with another lawsuit."

Weiss contends that Rule 60(b) "is not an appropriate enforcement vehicle," citing O'Link v. O'Link, 632 P.2d 225, 229 (Alaska 1981), for the proposition that relief under the rule is available only under "the most extraordinary of circumstances." In O'Link, we stated: "Clause (6) [of Rule 60(b)] and the first

five clauses of Rule 60(b) . . . are mutually exclusive. Relief under clause (6) is not available unless the other clauses are inapplicable. . . . Clause (6) is reserved for extraordinary circumstances not covered by the preceding clauses." 632 P.2d at 229. This rule, however, does not contradict the well-established practice of using Rule 60(b)(6) "to return the parties to the status quo" after "one party fails to comply" with a settlement agreement. 11 Charles A. Wright et al., Federal Practice and Procedure § 2864, at 352 (1995).[27] A material change of the settlement agreement by the legislature would thus present one of the narrowly defined situations that clearly present "other reason[s] justifying relief" under Rule 60(b)(6).

Weiss also argues that the court should not have approved the settlement unless the State agreed "to be bound by a consent decree or otherwise subject to specific performance." The Proponents respond that plaintiffs "retain the ability to specifically enforce the settlement agreement" and "to enforce legislation enacted as part of the settlement." They argue that no agreement could bind future legislatures so as to prevent amendment of the HB 201 settlement statutes. The Proponents are correct. It is a well-established principle that one legislature cannot abridge the power of a succeeding legislature. 73 Am. Jur. 2d Statutes § 34 (1974); State v. Lewis, 559 P.2d 630, 643 (Alaska 1977); Application of Hendrick & Irish, 922 P.2d 943, 951 (Haw. 1996). Thus, it would be impossible for the State to grant the enforcement terms Weiss would require. Furthermore, the proponents are also correct in stating that the court relied primarily on the "product" elements of the settlement, that is, the reconstitution of the trust with land and cash, rather than on the "process" elements contained in the program benefits. The class

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[27] Because Rule 60(b)(6) is modeled on its federal counterpart, federal authorities are instructive in interpreting the state rule. See Agostinho v. Fairbanks Clinic, 821 P.2d 714, 716 n.4 (Alaska 1991).

need not rely entirely on either judicial supervision or "the good faith cooperation of the defendants," Morales v. Turman, 569 F. Supp. 332, 334 (E.D. Tex. 1983), to ensure the realization of significant benefits of the settlement. Therefore, the superior court did not err in granting approval to the settlement.

7. Summary

In summary, the superior court did not err in its careful evaluation of the settlement and the likely result of continued litigation. After taking into account "the uncertainties of law and fact . . . and the concomitant risks and costs necessarily inherent in taking [the] litigation to completion," the court did not abuse its discretion in holding that the settlement is fair, adequate, and reasonable.

C. Did the Superior Court Abuse Its Discretion by Establishing the Approval Process?

Weiss also attacks the process under which the settlement was negotiated and approved. Specifically, he objects to (1) the superior court's definition of the class, (2) the conduct of negotiations between the parties, (3) the notice to class members and the court's consideration of class comments, and (4) the schedule established by the court for consideration of the settlement.[28]

1. Definition of the class

The superior court redefined the class in 1994 as

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[28] Weiss also argues that the trial court abused its discretion by not granting preliminary approval to the Chapter 66 settlement and by denying a motion to substitute Billy R. Cross for John Martin. Because our decision moots these issues, we do not address them.

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer major mental illness, and such other persons needing mental health services as the legislature may determine.

The trial court ordered this redefinition on the motion of Weiss and AMHA to make the class "co-extensive with the beneficiaries of the trust" as determined by the superior court's Beneficiary Decision in 1988. Weiss argues that the superior court's Beneficiary Decision erroneously included the developmentally disabled[29] as beneficiaries of the trust and hence members of the class.

The superior court based its Beneficiary Decision on a review of the legislative history of the AMHEA. The court concluded, and Weiss does not dispute, that the version of the bill originally passed by the House included the developmentally disabled as beneficiaries of the trust. Weiss asserts, however, that the Senate "disagreed that they should be included." As evidence for this position, he relies on a comment made by the sponsor of the bill in the Senate, Senator Jackson, that "[t]here are a lot of people who are mentally retarded that should not be under the provision of this bill." The context of this remark, however, suggests that Senator Jackson was concerned that inclusion of the developmentally disabled under the AMHEA's definition of "mentally ill" might lead to their imprisonment or stigmatization, not that he felt they should be excluded as

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[29] See supra note 4.

beneficiaries. Furthermore, Senator Jackson never came to a conclusion on the matter; after a brief exchange, he merely states, "I do not know. My mind is open . . . ." His statement thus provides no evidence of legislative intent to exclude the developmentally disabled as beneficiaries of the trust.

Weiss also argues that the Senate's refusal to adopt language suggested by the Department of Health, Education, and Welfare (HEW) demonstrates its intent not to include the developmentally disabled. The proposed language would have replaced the phrase "mentally ill" in the House version of AMHEA § 202(e) with the phrase "the mental health program of Alaska, including (but not by way of limitation) the out-patient and in-patient care and treatment of the mentally ill, and of the mentally defective and mentally retarded, of Alaska." The version of the AMHEA finally passed by the Senate retained the phrase "mental health program," but dropped the remainder of HEW's proposed language. The report by the House managers noted the difference between the House version, defining the phrase "mentally ill" to include the developmentally disabled, and the Senate version, using the phrase "mental health program" with no definition. The managers stated that they "accepted this Senate amendment which broadens the use of the revenues for use of the Alaska mental-health program rather than for the hospitalization and care of the mentally ill in Alaska." Because the House version included the developmentally disabled, the superior court reasonably concluded that a version that "broadens" the program would also include those individuals. Moreover, the relatively vague phrase "mental health program" does not support an intent by the Senate to exclude potential beneficiary groups. The Senate's decision not to adopt the rest of HEW's proposed amendment shows little more than a desire to avoid cumbersome and unnecessary language.

The superior court's conclusion is also supported by other parts of the AMHEA. Along with the land grant, the AMHEA provided for grants

> to the Territory of Alaska to assist it to carry out plans, submitted by the Governor of the Territory or his designee and approved by the Surgeon General, for an integrated mental health program for the Territory, including outpatient and inpatient care and treatment.

AMHEA § 201. This suggests that Congress intended the meaning of the term "mental health program" to be determined by the Territory and the Surgeon General. The superior court found, and Weiss does not dispute, that the first mental health program enacted by the Territory in 1957 defined "mentally ill individual" as "an individual having a psychiatric or other disease or senile changes which substantially impair his mental health or who is mentally deficient." The superior court also noted that one impetus for passage of the AMHEA was to end the need for placing Alaskans with mental problems in Morningside Hospital in Portland. These Alaskans included the developmentally disabled. Therefore, we hold that the superior court did not err in determining that Congress intended the developmentally disabled to be beneficiaries of the trust and hence members of the plaintiff class in this litigation.

2. Settlement negotiations

Weiss argues that the HB 201 settlement was the result of collusion between the State and counsel for the H.L. and Bosel Intervenors.[30] Weiss claims that collusion occurred between the

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[30] Weiss also argues that the superior court erred by failing to make a specific finding that the class was adequately represented. The case upon which Weiss relies, In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 & n.21 (7th Cir. 1979), supports the proposition that the court must consider whether the class is adequately represented by the "representative parties" in the action under Alaska Civil Rule 23(a)(4). However, neither that case nor any other authority requires the trial court to make a specific finding

State and Proponents because Proponents (1) "caused the State to withdraw from the Chapter 66 Settlement Agreement by being willing to support" the HB 201 settlement, (2) supported the "passage of legislation [HB 201] that provided for the dismantling of the trust if their negotiated settlement is not approved by the courts," (3) "negotiated a settlement and a schedule that would not allow judicial determination of whether the [Trust Authority's] key right to spend the Trust's income free of legislative appropriation was constitutional," and (4) "assured the mental health community that they would only accept a settlement that contained certain elements to gain their support and then negotiated a settlement that did not contain those elements." The superior court considered these arguments in its decision granting preliminary approval and found no evidence of collusion. Instead, it found that Weiss's points merely demonstrated "that the attorneys had legitimate disagreements."

A trial court "may not approve a proposed settlement if it is the product of fraud or overreaching by, or collusion among, the negotiating parties." In re Pacific Enters. Secs. Litig., 47 F.3d 373, 378 (9th Cir. 1995) (quotation omitted). Black's Law Dictionary defines "collusion" as follows: "An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose." Black's Law Dictionary 264 (6th ed. 1990). In the absence of evidence to the contrary, "courts generally attach 'a presumption of correctness . . . to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery.'"

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that the class is adequately represented by counsel. Even if there were such a requirement, the superior court's consideration of the conduct of the settlement negotiations by Proponents' counsel would have met it.

Herbert B. Newberg & Alba Conte, 2 Newberg on Class Actions § 11.28, at 11-59 (1992) (quoting Manual for Complex Litigation, Second § 30.44 (1985)). Evidence suggesting collusion may include significant differences in the relief received by different groups within the class or the simultaneous negotiation of attorney's fees and class claims. See Manual for Complex Litigation, Third § 30.42 (1995).

Given these principles, we conclude that even if Weiss's first three allegations are true, they do not establish collusion. As Proponents point out, Weiss does not allege that secret meetings were held, that Proponents' counsel excluded his counsel from meetings, that settlement proposals were not relayed as they were received, that he was not allowed to comment on the proposals, or that he was not free to negotiate independently with the State. Furthermore, there is no argument that Proponents or Proponents' counsel benefitted from the settlement unfairly. The superior court properly found that these arguments show merely "that the attorneys had legitimate disagreements."

Weiss's principal evidence supporting the fourth allegation is a letter written by counsel for AMHA purportedly documenting an agreement as to negotiating strategy between counsel. The superior court specifically found that "the attorneys had legitimate disagreements over the interpretation" of that letter. While Weiss argues that the letter embodied a "formal agreement" representing "absolute bottom line requirements for a settlement," Proponents interpret the letter "as evidence of Weiss's counsel's continued support for the basic settlement proposal." Considering the ambiguous language of the letter, the fact that counsel for Proponents never responded to it, and the continued willingness of counsel for Weiss to participate in a settlement even after the alleged agreement had been "breached," the superior court did not err in finding that the letter showed no evidence of collusion on the part of counsel for the H.L and Bosel Intervenors.

3. Notice

Notice of the proposed settlement was sent to every household in Alaska and to 1400 providers of mental health and other services. In addition, notice was published in newspapers, announced on radio and television, distributed on audio cassette, published in Braille and large print, and translated into Spanish, Filipino, Inupiaq, and Yupik. The notice allowed for comments by members of the public, including family, guardians and friends of beneficiaries, and provided a form allowing commentors to identify themselves as beneficiary members of the class, guardians or relatives of a class member, or members of the public. The trial court received 1088 comments, about 150 from class members, eighty from advocacy groups or people "indicating they work in the mental health field," and about 170 from family members and guardians of class members. The court treated comments from these groups as class comments, but considered all others public comments and gave them little weight. Weiss argues that the superior court abused its discretion in approving the content of the notice and by allowing individuals who were not members of the class to comment.

Weiss objects to the content of the notices, asserting that it: (1) was "silent on the State's unilateral right to alter the settlement;" (2) failed to inform the class of the risk that the power of the Trust Authority to spend trust funds without legislative appropriation might be found unconstitutional; (3) did not mention that more litigation might be required to ensure that land management regulations comply with the AMHEA; (4) did not urge the class to "consider the importance of cash to them;" (5) did not "describe the value of the original Trust and the value of the HB 201 Settlement Trust; (6) stated that the settlement contained 930,000 acres as compared with 1,000,000 acres "without any kind of disclosure that only land that no one else wanted is included;" (7) incorrectly suggested that the "settlement commits the State and Trust Authority to providing an adequate mental health program;" and (8) falsely stated that the Trust Authority would "oversee" management of trust land.

According to one authority,[31]

> [t]he contents of a Rule 23(e) notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing.
>
> The notice should be brief and reasonably clear to the minimally sophisticated layperson. However, the terms of the settlement and the course of the litigation should not be oversimplified to increase readability at the expense of accuracy and completeness. Of course, as the length of litigation, the complexity of issues, and the variety of terms of settlement increase, their description in a Rule 23(e) notice will generally be more elaborate. . . . [W]here some multiple plaintiffs oppose a proposed class settlement, the court in its discretion may insist that notice of the settlement under those circumstances be neutral in tone and should not include either a party's or the court's arguments for or against settlement.

2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 8.32 (3d ed. 1992) (footnotes omitted).

The notice provided by the superior court meets these criteria. Moreover, adopting Weiss's suggestions would have created a substantial risk of either misleading class members or violating the neutral tone called for by the class's split over the

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[31] See supra note 27.

settlement. The trial court successfully struck a difficult balance between providing enough information for the class to evaluate the settlement and making the notice understandable to as many class members as possible. Therefore we conclude that the superior court did not abuse its discretion by approving the content of the notice.

In arguing that the superior court abused its discretion by allowing comments by individuals who are not class members, Weiss relies on Gould v. Alleco, Inc., 883 F.2d 281 (4th Cir. 1989). This case stands for the unobjectionable proposition that only class members have standing to object to settlement proposals. Id. at 284. The Gould court, however, explicitly stated that its "ruling regarding the lack of standing of non-class members to object to proposed settlements should not be read to restrict the trial court's authority to consider or even solicit the views of non-parties to proposed class settlements." Id. at 284 n.3.

Accepting comments from individuals outside of the class was particularly appropriate in this case because, as the superior court stated, "many members of the class may not be able to understand the notice or speak for themselves." Thus, the court properly considered the "comments from family members, guardians, advocacy groups, mental health professionals, and others working directly with trust beneficiaries" as class comments. Furthermore, the court, by including a space on the notice form for commentors to identify their status with respect to the litigation, provided adequate protection against the risk of improperly considering comments from the general public. Judge Greene adopted an excellent procedure both for disseminating notice of the proposed settlement and for distinguishing class comments from public comments so as to evaluate each appropriately.

4. Due process

Finally, Weiss argues that he was denied due process because the superior court did not grant "adequate time to brief, prepare for and conduct the hearings" and "did not give the time to its deliberations necessary to fulfill [his] right to a fair and impartial decision." We have stated that due process under the state constitution requires "notice and opportunity for hearing appropriate to the nature of the case." Carvalho v. Carvalho, 838 P.2d 259, 262 (Alaska 1992) (citations omitted). The United States Supreme Court has further stated that due process under the Federal Constitution requires that every person "shall have the protection of [a] day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial." Truax v. Corrigan, 257 U.S. 312, 332 (1921).

Weiss cites a number of cases in support of his position that the superior court failed to give him adequate time to satisfy his due process rights to contest the HB 201 settlement. In these cases, however, the injured party was denied all opportunity for a hearing, not merely constrained by the court's schedule.[32] E.g. Carvalho v. Carvalho, 838 P.2d 259, 263 (Alaska 1992); Frontier Saloon, Inc., v. Alcoholic Beverage Control Bd., 524 P.2d 657, 658 (Alaska 1974). In this case, the trial court

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[32] Weiss also cites Channel Flying, Inc. v. Bernhardt, 451 P.2d 570, 572-73 (Alaska 1969), to support the statement that we have "recognized the due process implications of forcing a litigant to proceed without having an adequate opportunity to prepare." In Bernhardt, we stated that a trial judge erred by not allowing a party reasonable time to respond to late filings raising matters "which petitioners would find it important to meet if they were to succeed in their efforts to obtain a preliminary injunction." Id. at 573. Weiss makes no allegation that the parties did not have equal amounts of time to prepare and present their cases and to respond to the arguments of their opponents.

established a seven-month schedule to consider the settlement and conducted a four-day evidentiary hearing on preliminary approval and a ten-day evidentiary hearing on final approval. Weiss introduced considerable testimony in support of his position, including testimony of twelve expert witnesses at the final approval hearing, and exhaustively briefed his opposition to both preliminary and final approval as well as a number of other related issues. Weiss clearly had ample opportunity to present his case.

Furthermore, Weiss fails to identify how any time constraints caused him serious prejudice. We will not disturb a trial court's refusal to grant a continuance unless a party has been seriously prejudiced by that refusal. House v. House, 779 P.2d 1204, 1206 (Alaska 1989). In this case, as in House, the lower court's ruling was "based on a review of all the relevant evidence and . . . the complaining party had reasonable opportunity in court to introduce evidence and contest the other side's evidence. Inability to mount a successful case does not mean that due process was violated or that an abuse of discretion occurred." Id. at 1207. Therefore we hold that the superior court did not violate Weiss's due process rights by establishing and adhering to its schedule for final approval.

We also reject Weiss's assertion that the superior court failed to give adequate consideration to his claims. Judge Greene's thorough, deliberative, and well-reasoned analysis is documented by her fifty-eight page preliminary approval memorandum, her 137-page final approval memorandum, and her other decisions resolving earlier stages of this litigation. We are satisfied that Judge Greene gave Weiss's position the full benefit of her able consideration.

IV. CONCLUSION

In closing, we echo Judge Greene's thoughts on the resolution of this lengthy litigation:

> The settlement process as a whole has done some harm. The class and their families are very divided on the question of this settlement. Some may feel cheated and abandoned by this decision approving it. Others may feel vindicated. Hopefully, neither will persist in those feelings. Whether or not to approve this settlement was a very difficult and complex decision. The court shares many of the concerns that have been expressed by the class. The task that lies ahead for the beneficiaries, their friends and families is to come together to make the best of this agreement. The beneficiaries will need to speak with one voice again, if their concerns are not heeded. They need to heal the divisions that exist today and vow as recommended by one commenting beneficiary to go "out of the courts and into the budget."

We conclude that Judge Greene's approval of the HB 201 settlement demonstrated a sound understanding of the relevant authority and the facts of this case, as well as a keen regard for the rights and interests of the plaintiff class. Weiss has not clearly demonstrated that approval of the settlement on the basis that it was fair, adequate, and reasonable constitutes an abuse of discretion. Therefore, we AFFIRM the superior court's decision.

SUPREME COURT OF ALASKA

STATE OF ALASKA,)
Appellant/Cross-Appellee,)
vs.)
VERN T. WEISS, et al.,)
Appellee/Cross-Appellant.)
)

Nos. S-653/678, No. 2987
706 P.2d 681
October 4, 1985

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Warren W. Taylor, Judge.

COUNSEL

G. Thomas Koester, Assistant Attorney General, Norman C. Gorsuch, Attorney General, Juneau, for Appellant/Cross-Appellee.

Stephen C. Cowper, Fairbanks, for Appellee/Cross-Appellant. Russ Winner, McGrath & Associates, Anchorage, for Amicus Curiae Cook Inlet Region, Inc.

JUDGES

Before: Rabinowitz, Chief Justice, Burke, Matthews and Compton, Justices. Moore, Justice, not participating

OPINION

COMPTON, Justice. OPINION

The State of Alaska ("state") appeals from a judgment of the superior court holding that the state breached its duty as trustee of federal mental health grant lands when the legislature redesignated the property as "general grant land." For the reasons

set forth below, we affirm the holding to this extent, but reverse the superior court's conclusion that the redesignation legislation was valid.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1956 the United States Congress passed the Alaska Mental Health Enabling Act (AMHEA) which, insofar as it concerns this case, granted the Territory of Alaska one million acres of federal land to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska. Pub. L. No. 84-830, 70 Stat. 709 (1956). Section 202(e) of the Act specifically provides:

> *All lands granted* to the Territory of Alaska under this section, together with the income therefrom and the *proceeds* from any dispositions thereof, *shall be administered by the Territory of Alaska as a public trust* and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

The state managed these lands without maintaining a separate account until 1978. The Alaska State Legislature made its practice law in 1978 when it passed the following statutory provision:

> REDESIGNATION AND DISPOSAL OF MENTAL HEALTH LAND
>
> (a) Land granted to the state under the Mental Health Enabling Act of 1956, 70 Stat. 709, and patented to or approved for patent to the state on July 1, 1978 and land designated as mental health land which was received by the state in exchange for land granted under that federal land grant is redesignated as general grant land and shall be managed and disposed of by the Department of Natural Resources under applicable provisions of law.

Ch. 181, § 3(a), SLA (1978).

Alaska has provided continuous mental health care since statehood. The record indicates that between 1959 and 1982 the state spent over $222,000,000 on mental health care. Generally speaking, there has been a constant increase from 1959 to the present in mental health expenditures: slightly less than $1,200,000 was expended in 1959, and slightly more than $29,000,000 was expended in 1982. The record does not indicate how much of the trust land at issue has been disposed of, nor the total value of such disposed land. In the state's answer to the complaint, it alleges that "state expenditures for mental health purposes exceeded revenues from mental health grant lands in all years for which revenues from those lands were tabulated separately." The record does indicate that as of 1973, total revenues from these mental health trust lands amounted to $19,555,582. The state's total expenditures to that point amounted to $66,726,176.

Weiss et al. filed a class action in 1982 alleging that the state breached the public trust by 1) failing to account for revenues realized, 2) using revenues for purposes other than mental health care and 3) passing legislation redesignating the property "general grant land." Plaintiffs sought declaratory relief invalidating the redesignation legislation; injunctive relief compelling the state to administer the trust according to the law; general relief establishing a trust account "for the receipt of funds generated from all lands selected by the State of Alaska under the aforesaid mental health land grant . . . ."

The superior court ruled that invalidation of the redesignation legislation was not an available remedy, based on *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981). However, the court did hold that the state breached its duties as trustee by removing the federal grant lands from the trust. As a remedy, the court ordered that

> [t]he public trust established by P.L. 84-830, 70 Stat. 709, shall recover from the defendant State of Alaska an amount equal to the fair market value of all lands conveyed from the trust as of the date of conveyance, plus prejudgment interest from the date of each conveyance. For the purposes of this judgment, all lands remaining in the trust as of July 19, 1978, shall be considered as having been removed from trust status by the State of Alaska on that date . . . .

The court also ordered a set-off for all monies spent by the state on mental health care.

The state appeals from the judgment, except the holding that the redesignation legislation was valid. Weiss *et al.* cross-appealed the trial court's failure to rule the legislation invalid.

II. DID THE STATE BREACH THE PUBLIC TRUST CREATED BY CONGRESS WHEN IT REDESIGNATED

PROPERTY IN THE TRUST AS "GENERAL GRANT LAND?"

A. Nature of the Trust.

The state argues, essentially, that the redesignation is of no legal consequence because the state has always provided public mental health programs in the past and, implicitly, will provide them in the future. The state maintains that providing such programs fulfills its obligations according to AMHEA, freeing the grant lands for other public purposes. Textual support for this position comes from the portion of Section 202(e) which states that "proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska." It is suggested that this language means Congress intended that the land grant serve as a revenue base guarantee. Great emphasis is placed on the legislative history of AMHEA which establishes that Congress did not wish to limit the use of grant lands *exclusively* to mental health programs.[1]

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[1] The debates in the House and Senate are too lengthy to reproduce in their entirety here, but certain remarks are representative of the discussions. Senator Jackson commented that "the income from sales or leases will be used to support the mental health program in Alaska. The income will be held in trust for that purpose. Any money received over and above the need for the mental health program may be used for other public purposes." He further noted that the language change was not of a fundamental nature, and thus said that, "the purpose of granting 1 million acres is the same as in all other similar grants, such as the public school land-grant program." 102 Cong. Rec. 9761 (June 7, 1956).
We note that the language in the federal grant was changed from designating the proceeds of the land grant to be used as a public trust for Alaska's mental health program, to saying that the proceeds "shall first be applied to meet the necessary expenses of the mental health program" only because of worry among members of Congress that the land may actually have a value far in excess of the necessary health care expenses. The record in this case shows that income from the land grant was actually less than state expenditures for mental health programs.

Despite these observations, we think it irrefutable that Congress intended to create a trust, to be based on a corpus of one million acres of federal land. It is a commonplace of the law that without trust property there can be no trust. Restatement (Second) of Trusts § 74 (1959).[2] When the state, through the legislature, altered the status of the property grant the trust was thereby effectively terminated. The state, as trustee, had no power to do this and consequently breached its duty to preserve the corpus.[3] The fact that the state has provided mental health care in the past and will most likely do so in the future is no justification for termination of the trust. Whether a beneficiary can rely on the *bona fides* of a trustee to continue voluntarily to uphold the terms of a defunct trust is quite beside the point. We decline the opportunity to encourage the state, or any trustee for that matter, to determine unilaterally when to terminate a trust without specific authority to do so.

B. Remedy.

Having concluded that the state breached the trust, we find it necessary on the facts of this case to invalidate the redesignation statute, Ch. 181, § 3(a), SLA (1978). *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981) does not compel a different result. In that case, the federal government had granted 100,000 acres to the state "for the exclusive use and benefit" of the University. Id. at 811. Years after the grant, the state included 5,040 acres of the trust land in a state park. This

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[2] Section 74 provides: "A trust cannot be created unless there is trust property."

[3] Our reliance upon basic trust law principles finds ample support in the precedents of this court and the United States Supreme Court. See *Lassen v. Arizona*, 385 U.S. 458, 17 L. Ed. 2d 515, 87 S. Ct. 584 (1967); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981). Both *Lassen* and *University of Alaska* involved federal grants to be used by states for school purposes. Those cases stand for the proposition "that the same private trust law principles are to apply to federal land granted to the states for school purposes." *University of Alaska*, 624 P.2d at 813. There is no reason to treat federal lands granted for mental health purposes differently.

action was not in itself a breach of the trust so long as the University was paid fair market value for the land. We inferred that the legislature intended to pay the University for this disposition, stating:

> It is also logical to assume that the legislature intended to compensate the University for the loss of its land. This view gives the statute creating [the park] a reading that is in accord with the well recognized cannon of statutory construction that, when possible, legislation should be construed in a way that upholds its validity.

524 P.2d at 816.

Unlike the situation in *University of Alaska*, the present case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the trust is intermingled with the general grant lands of the state. No particular use of the trust lands is specified and it may be years before much of the land is used. While it was reasonable to infer a legislative intent to pay for 5,040 acres for which there was a present park land use in *University of Alaska*, it is not reasonable to infer that the legislature meant to pay for a quantity of trust land approaching one million acres for which in large part there is no present use. Thus, the payment remedy imposed in *University of Alaska* is not appropriate here. Because the state in passing the redesignation act went beyond the power which had been granted it with respect to the trust lands by Congress, the redesignation act must be declared invalid.

It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.

Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.[4]

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings consistent with this opinion.

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[4] Amicus raises questions regarding the title held by conveyances and bona fide purchasers of mental health lands. In view of our disposition of this case, we deem it unnecessary to address those issues at the present time.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,	)	FILED in the Trial Courts State of Alaska Fourth District Dec 06, 1994
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

Case No. 4FA-82-2208 Civil

MEMORANDUM DECISION AND ORDER GRANTING FINAL APPROVAL TO THE HB 201 SETTLEMENT

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I. INTRODUCTION

This lawsuit is a class action which began twelve years ago. Alaska Civil Procedure Rule 23 contains procedures specifically governing class actions in state courts. It is essentially identical to the corresponding federal rule. See Alaska R. Civ. P. 23. Subsection (e) of Rule 23 safeguards the rights of class members by requiring court approval of any proposed settlement after notice has been given to the class.[1] Alaska R. Civ. P. 23(e). Due process requires that notice to the class members be given

[1]Alaska Civil Rule 23(e) states:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Alaska R. Civ. P. 23(e).

because settlement of a class action has res judicata effects on all class members.[2] Grunin v. Intern'l House of Pancakes, 513 F.2d 114, 120 (8th Cir.), cert. denied, 423 U.S. 864, 46 L.Ed.2d 93 (1975). The requirement of court approval of settlements prevents private agreements which are contrary to the best interests of the class and protects the interests of absent class members who are not among the negotiating parties.[3] In re Agent Orange Product Liability Litigation, 597 F.Supp. 740, 758 (E.D.N.Y. 1984).

The approval process for settlement of a class action involves several steps: (1) submission of the proposed settlement to the court; (2) if necessary, an evidentiary hearing about the negotiation process and other concerns about the settlement proposal; (3) preliminary approval by the court and an order regarding notice to the class and the scheduling of a final hearing at which members of the class may comment; (4) notice informing class members of the proposed settlement and solicitation of their comments concerning the settlement; (5) a fairness or final approval hearing regarding whether the settlement is reasonable and fair to the class; (6) final approval of the settlement by the court and either dismissal of the case or continuing court oversight of the implementation of settlement provisions. See generally H. Newberg, Newberg on Class Actions § 11 (3d ed. 1992); Manual for Complex Litigation, Second § 30.4 (1985) ["MCL2d"].

At the preliminary approval stage, the court determines whether the proposed settlement has obvious deficiencies and is

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[2]The type of notice required for due process depends upon the nature of the class and the kind of relief involved. This is discussed in relation to this case in part IV of this Memorandum Decision.

[3]The Civil Rule 23(e) requirements for the settlement of class actions are necessary because of the possibility that:

> substantial rights of the class may be bargained away in exchange for relief which inures primarily to the named plaintiffs or to class counsel. Because of the potential for abuse, protection of class interests cannot be left to class counsel alone. The Court must act as the guardian of the class.

Holden v. Burlington Northern Inc., 665 F. Supp. 1398, 1406 (D. Minn. 1987) (citations omitted).

sufficiently within the range of possible approval to warrant the time and expense for giving notice to the class. See, e.g., Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980). At the final hearing, proponents of the settlement must convince the court that the proposed settlement is "fair, reasonable, and adequate" before final approval may be granted. E.g., Grunin v. International House of Pancakes, 513 F.2d at 123. The class comment portion of the final approval hearing provides an opportunity for class members to present their objections to the settlement. In re Agent Orange, 597 F. Supp. at 759.

The court's role in reviewing a class settlement is limited to the minimum necessary to protect the interests of the class. Armstrong, 616 F.2d at 315. A class action settlement remains a bargained bilateral compromise negotiated between the litigants. Id. The court has no authority to delete, modify, or substitute terms of the settlement and can only accept or reject the settlement proposal as it is presented. Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 630 (9th Cir. 1982); MCL 2d § 30.41, at 237.

This proposed settlement is now before the court for decision on whether it should receive final approval. It was submitted by three of the parties in June 1994. The court conducted an evidentiary hearing in July. The court granted preliminary approval on July 29, 1994. The class has received notice. The court has received comments from the class. The court conducted a lengthy hearing on the fairness of the settlement. The opinion that follows explains the process and contains an analysis of the settlement agreement.

II. BACKGROUND

A. History of the Case

The mental health lands trust was created by Congress with passage of the Alaska Mental Health Enabling Act of 1956 ["Enabling Act"]. Pub. L. No. 84-830, 70 Stat. 709 (1956). The Enabling Act transferred responsibility for mental health programs

from the federal government to the Territory of Alaska and granted a one million acre trust to the Territory to aid in the financial support of a comprehensive mental health program.[4] Pub. L. No. 84-830, §§ 101, 202, 70 Stat. 709 (1956). Section 202(e) of the Enabling Act states:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

Pub. L. No. 84-830, § 202(e), 70 Stat. 709 (1956). Section 6(k) of the Alaska Statehood Act confirmed and transferred the mental health trust land grant from the Territory to the State. Pub. L. No. 85-508, § 6(k), 72 Stat. 339 (1958).

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[4]In 1956 no mental health services existed in Alaska. The federal government transported mentally ill and mentally retarded people in need of hospitalization to the Morningside Hospital in Portland, Oregon.

The State of Alaska managed trust lands in the same manner as lands granted under section 6(a)-(b) of the Alaska Statehood Act ["general grant lands"] and did not maintain separate accounting for revenue produced by trust lands.[5] Because the mental health trust lands were some of the first land parcels selected by Alaska, trust lands were among the most attractive state lands for surface value use both for private development and public purposes. During the 1970's there was growing pressure on the Legislature to convey state-owned land to private individuals and municipalities. In 1978, the Alaska Legislature enacted Chapters 182 and 181, SLA 1978, redesignating mental health trust lands as general grant lands to be managed and conveyed as all other state-owned lands. A percentage of all State land revenue was to be paid to a mental health trust fund to compensate the trust for the loss of the lands "subject to legislative appropriation of sufficient funds." Ch. 182 § 4, SLA 1978. No money was ever appropriated by the legislature to the fund.

After the redesignation legislation, some of the original mental health trust land was set aside for public purposes such as parks, recreation, and wildlife habitat. Much of the trust land located within municipal boundaries was transferred to municipalities, who later sold some of this land to private individuals. Many of the trust lands most suitable for development were sold by the State to private individuals through the land sale programs implemented by the Alaska Department of Natural Resources ["DNR"]. Overall, up to 50,000 acres were conveyed to private individuals, over 40,000 acres were conveyed to municipalities, and over 350,000 acres were placed in legislatively designated areas[6] such as

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[5]Most state-owned lands are the general grant lands conveyed to Alaska under subsections (a) and (b) of section 6 in the Alaska Statehood Act.

[6]In legislation for a previous settlement attempt in this case, the term "legislatively designated area" was defined as land designated by state law as a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range. Ch. 66 §§ 54(6), 55(b), SLA 1991.

state forests, parks and wildlife areas. Only about 35 percent of the original one million acres of trust land remained unencumbered and in state ownership in 1985.

Vern Weiss, on behalf of his son Carl Weiss, and Earl Hilliker filed this lawsuit as a proposed class action on November 26, 1982. The complaint stated that Earl Hilliker and Carl Weiss were in need of mental health services unavailable in Alaska. They claimed that the State breached the mental health lands trust by failing to account for trust revenues, using the revenue from trust lands for purposes other than mental health services, and redesignating trust lands as general grant lands. In January 1983, the lawsuit was certified as a class action, and the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska." Order Certifying Action (Jan. 26, 1983) (Judge Taylor). The superior court ruled that the State breached its duties as trustee by redesignating the trust lands as general grant lands, but also ruled that invalidation of the 1978 redesignation legislation was not an available remedy. The superior court ordered the State to pay the trust an amount equal to the fair market value of lands conveyed from the trust as of the date of conveyance plus prejudgment interest from the date of each conveyance. Additionally, the superior court ordered a setoff for all money spent by the State on mental health services. Both sides appealed from that decision.

In October 1985, the Alaska Supreme Court upheld the superior court's ruling that the State had breached its obligations as trustee for the mental health lands trust established by Congress in 1956. State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). However, the Supreme Court invalidated the 1978 redesignation legislation and held that the trust should be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. Weiss, 706 P.2d at 684. The Supreme Court provided the following "guidance" to the superior court on remand:

> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of the sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that the expenditures exceeded the value of the land sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

Weiss, 706 P.2d at 684 (footnote omitted). The Court specifically declined to rule on questions raised in amicus briefs regarding the title held by the conveyancees and bona fide purchasers of mental health trust lands. See Weiss, 706 P.2d at 684 n.4.

In 1985, Weiss and Hilliker were the only class representatives. The Alaska Mental Health Association ["AMHA"] was permitted to intervene on January 24, 1986, and Mary C. Nanuwak and John Martin were added in June 1986.[7] The AMHA intervened because of its disagreement with the manner in which the original plaintiffs' attorney was conducting the case.[8] See Transcript of Oral Argument before the Alaska Supreme Court, at 2-4, 7 (Jan. 14, 1986). In particular, the AMHA believed that the

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[7]These intervening plaintiffs are represented by James B. Gottstein.

[8]Stephen Cowper was the original plaintiffs' attorney until October 1985. Aff. Cowper (June 2, 1986). William Council replaced Cowper, but withdrew in March 1986. David Walker has been the attorney for Weiss and Hilliker since 1986. See Order Granting Motion for Withdrawal by Attorney and Substitution (filed April 1, 1986).

validity of many of the State's conveyances of mental health land to third parties, such as municipalities, should be challenged, because the conveyances were the result of the State's breach of trust. Id. at 18, 27-29. The superior court permitted AMHA to file additional claims only to the extent that the claims related directly to the reconstitution of the trust ordered by the Alaska Supreme Court in State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). Order (June 19, 1986) (Judge Greene).

On March 31, 1987, the court permitted Bosel, Doulin, Goodwin, and Mayoc ("Bosel") to intervene in order to assure adequate representation for the developmentally disabled who were potential members of the class. Soon after intervening, the attorney for Bosel, Jeff Jessee, requested that mentally retarded and mentally defective individuals be declared to be among the intended beneficiaries of the trust and members of the class. Bosel's Motion for Partial Summary Judgment (July 14, 1987). Mr. Walker and Mr. Gottstein, attorneys for Weiss and AMHA respectively, opposed including as beneficiaries individuals not falling within the traditional definition of "mentally ill."

H.L., M.K., and Alaska Addiction Rehabilitation Services ("H.L."), on behalf of chronic alcoholics with psychoses, were permitted to intervene on June 1, 1987. Order Granting Intervention (June 1, 1987). H.L. sought to intervene "to assure better representation of the class" and to assure that the relief obtained in this action reflects the needs and characteristics of [chronic alcoholics]." H.L.'s Memorandum in Support of Motion to Intervene, at 1, 3 (May 13, 1987).

In 1988 the court ruled that Congress intended the trust to benefit at least those individuals suffering from a psychiatric illness who may require hospitalization and the mentally defective and retarded. Memorandum Decision and Order, at 16-17 (April 27, 1988). Included in this definition of trust beneficiaries were chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness. Id. at 17 n.6. The court also concluded that it was within the discretion of the

State to include other groups as recipients of services by the mental health program, but it was not within the discretion of the State to exclude the groups specifically identified by the court as intended beneficiaries. Id. at 17. The class definition was modified in 1994 to coincide with this definition of the beneficiaries as a result of this decision. The class is now defined as

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer from major mental illness, and such other persons needing mental health services as the legislature may determine.

Order Modifying Class Definition (Aug. 2, 1994).

The Supreme Court's "guidance" in its 1985 decision created almost as many issues as it resolved. The continuing uncertainty surrounding the validity of third party conveyances has been a major source of disagreement among the parties in evaluating the potential outcome of continued litigation. Because the setoff is applicable only to lands "sold," interpretation of the term "sold" within the context of the Supreme Court's decision has been another source of disagreement. It is in the interest of the class to include as few lands as possible within the definition of "sold," while it is in the State's interest to include as many lands as possible.[9] It is also hard to determine which specific state

[9]As a result, attorneys for the class have argued that the term includes only private third-party purchasers falling within the strictest possible definition of bona fide purchaser. The State, on the other hand, has suggested that any lands where an interest has been given or conveyed to others, including use of the land by another state agency, are "sold."

expenditures should be included in the setoff.[10] A simple return of all original trust lands still in state ownership presents problems for both the class and the State due to the impact on state forests, parks, and wildlife refuges, including the Chilkat Bald Eagle Preserve near Haines. These and other unresolved issues led the parties to spend several years pursuing proposals for settlement of this case.

B. Previous Settlement Attempts

Major attempts at settlement were made through legislation in 1987 (Chapter 48), 1990 (Chapter 210), and 1991 (Chapter 66). Chapter 48 and Chapter 210 were abandoned by the parties before the proposals were even presented to the court. The State withdrew from the Chapter 66 settlement after the court denied preliminary approval.

The Chapter 48 and Chapter 210 settlement proposals both involved the State's continued use of trust lands with the trust to be compensated with "rent." In Chapter 48, the trust was to be reconstituted entirely with land within legislatively designated areas and the original trust lands not within legislatively designated areas were to be released from trust status. The reconstituted trust was to have the same fair market value as the original one million acres of trust land. The State was to compensate the trust by "renting" the reconstituted trust lands at an annual amount of eight percent of the fair market value of the trust lands with the value of the lands to be redetermined every five years. Until fair market value of the lands was established, five percent of the State's unrestricted general fund revenues was to constitute the income of the trust. Chapter 48 also created the Alaska Mental Health Board to determine the needs of the mental health program and transmit funding recommendations to the governor and legislature.

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[10]For example, services specifically for alcoholics have not always been classified as mental health services, although chronic alcoholics suffering from psychosis are among the beneficiaries of the mental health lands trust. Additionally, the State has proposed inclusion of the cost of incarcerating people who are class members and violate the criminal laws.

The parties could not agree on the fair market value of the trust lands. The fair market value was estimated at $2.243 billion using procedures approved by the Interim Mental Health Trust Commission.[11] The State objected to this figure as grossly excessive. The Commissioner of DNR notified interested parties on April 17, 1990, that the State refused to follow the Commission's procedures for determining fair market value. An impasse resulted ending the consideration of the Chapter 48 settlement.

The Legislature then enacted a different proposal in Chapter 210, which eliminated the need for determination of land values. Chapter 210 provided for compensation to the trust in the amount of six percent of the State's annual unrestricted general revenues. Plaintiffs rejected this proposal, in part because they expected the State's general revenues to fall to a level at which the trust was unlikely to receive fair compensation for the value of the trust lands.

The State continued to convey original trust lands while various settlement proposals were negotiated. After the impasse in the Chapter 48 process was reached, plaintiffs obtained a preliminary injunction prohibiting the State from taking any further action on mental health lands. See Memorandum Decision and Order (July 9, 1990). The plaintiffs also refiled lis pendens on all original mental health lands. Between 4,000 and 6,000 land transactions were affected by the injunction and lis pendens. This placed many purchasers of small parcels in the difficult position of making all of their payments to the State for land purchased in state land sales, but being unable to obtain title to the land. Because of the cloud on their title, many of these individual purchasers found themselves unable to sell the land or obtain financing for construction. Original mental health trust lands have been closed to mineral activity since shortly after the Supreme Court's decision.

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[11]The Interim Mental Health Trust Commission was originally established under Chapter 132, SLA 1986.

In May 1991, after negotiations between the State and class counsel, the Alaska Legislature passed Chapter 66.[12] Chapter 66 established a procedure for reconstitution of the mental health lands trust through a process amounting to a land exchange between the State and the trust. It also contained amendments to legislation affecting some of the state's mental health programs and created a new agency, the Alaska Mental Health Trust Authority, to act as trustee. The Chapter 66 settlement was a land-based settlement without any significant cash component. During the negotiations leading to the enactment of Chapter 66, the State refused to consider a settlement with a large cash component. On April 6, 1992, a proposed settlement agreement incorporating Chapter 66 was signed by the State and three of the four attorneys representing the class, Mr. Walker, Mr. Gottstein, and Mr. Jessee.

The legality of portions of Chapter 66 and the 1992 proposed settlement agreement was challenged by intervening outside interests.[13] A group of public interest intervenors ["Public Interest Intervenors"][14] brought a broad-based constitutional attack on the parts of the Chapter 66 settlement which reconstituted the land trust.[15] Marathon Oil Company and Union Oil Company of California challenged portions of the settlement's reconstitution

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[12]Chapter 66 contained a provision that it would not become effective until this lawsuit was dismissed. Ch. 66 § 58, SLA 1991. That provision was changed during the special sessions of the 1994 legislature to provide that certain sections of Chapter 66 would become effective December 16, 1994 if the HB 201 settlement was approved and the lawsuit dismissed by December 15, 1994. Ch. 1 § 2-3, SSSLA 1994, amending Ch. 5 §§ 37 & 39, FSSLA 1994; Ch. 5 § 38, FSSLA 1994.

[13]The court's decisions on April 26 and May 14, 1993, with regard to these challenges have been appealed. The Alaska Supreme Court stayed the appeals when the State withdrew from the Chapter 66 settlement.

[14]The Public Interest Intervenors included the Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited. They were represented by attorneys for the Sierra Club Legal Defense Fund.

[15]The Public Interest Intervenors objected to the provisions for the land-based trust reconstitution contained in sections 54 through 57 of Chapter 66.

process which could affect their oil and gas leases on state land in Cook Inlet.

The Public Interest Intervenors' challenge attacked the constitutionality of many parts of Chapter 66. The challenge raised state constitutional issues of first impression in Alaska. The issues presented were very complex and briefing and decision substantially delayed consideration of the Chapter 66 settlement. The decision by this court invalidated the hypothecated lands list and held that state land laws were applicable to the trust unless the application of the law violated the Enabling Act. The settling parties had the right to withdraw from the agreement because they viewed these matters as crucial to the Chapter 66 settlement. The issues on appeal placed the entire settlement at risk.

The intervening oil companies challenged the legality of transfer of the State's interest as lessor in oil and gas rights on state land in Cook Inlet, as well as confidentiality provisions in the settlement agreement and the agreement on interim management of state lands. Their challenges also delayed the approval process and the issues on appeal threatened the very existence of the settlement.

Mr. Volland, attorney for H.L., opposed approval of the Chapter 66 settlement. Mr. Volland alleged that improprieties occurred during negotiations; an evidentiary hearing regarding negotiations was held in September 1992 and January 1993. Although Mr. Jessee, attorney for Bosel, signed the written agreement on April 6, 1992, he formally withdrew his support for it in December 1992. Mr. Walker, attorney for Weiss, and Mr. Gottstein, attorney for AMHA, both supported the Chapter 66 settlement.

On October 4, 1993, the court ruled that if a settlement received final approval in this case, all members of the class would

be bound by that decision, including those objecting to the settlement.[16]

On December 30, 1993, the court denied preliminary approval of the Chapter 66 settlement because there were serious deficiencies in the proposed settlement agreement. Memorandum Decision and Order, at 122 (Dec. 30, 1993). The class was not adequately protected by the agreement because it permitted any party to terminate the settlement agreement after final approval and dismissal of the case. Memorandum Decision and Order, at 121 (Dec. 30, 1993).

C. HB 201 Settlement

Negotiations for a new settlement began in January 1994. In February the State made an initial offer, which was discussed by all plaintiff groups and the third party intervenors.[17] The State invited counterproposals from any of the plaintiffs attorneys, and in March Mr. Volland submitted a counteroffer involving the formation of a permanent endowment fund for the state's mental health program. None of the other attorneys submitted a counteroffer.

On April 15, the State responded to Mr. Volland's counter-proposal with additional changes, including management of trust land by DNR. At an April 25 meeting attended by Mr. Volland, representatives of beneficiaries were generally supportive of the proposal with the exception of certain land management provisions. Management of trust land by DNR was opposed by many

[16]Class members who object to a settlement, however, may appeal a decision granting final approval.

[17]The Public Interest Intervenors, who were primarily interested in environmental impacts of development of lands in a reconstituted trust, played an active role in negotiating the contents of the list of lands to be included in the reconstituted trust under the new settlement. Public Interest Intervenors' Response, at 4 (July 1, 1994). Representatives from the coal industry and the oil and gas industry were also involved in the negotiation process. Mr. Volland sought to involve affected parties so that if a settlement was reached, it would not suffer the attacks from outside interests which plagued the Chapter 66 settlement.

beneficiaries or their representatives. Around this time, Mr. Walker and Mr. Gottstein indicated their dissatisfaction with the proposed settlement unless significant changes were made, but they continued to be involved in the negotiation process.

The State continued to pursue a contingency plan by advocating two sets of provisions, one for settlement and one for on-going litigation. The settlement provisions would become effective only if the case was dismissed by a specified date. Other provisions would become effective immediately and remain effective regardless of whether the case was dismissed. A few provisions would take effect immediately, but would be repealed if the case was dismissed by the specified date. In this way the State apparently hoped to better its litigation position if the settlement failed. These provisions and the deadline have been called "cram-down" provisions by objectors to the settlement. The inclusion of these provisions has created much ill will among many members of the class and their families, who view the State as acting unfairly.

HB 201 was passed in a special session immediately following the regular 1994 legislative session. It amended Chapter 66 and established a deadline of December 15, 1994, for final appellate and trial court approval in order for the settlement provisions to become effective. The accompanying appropriations bill, HB 371, was also passed in the special session. It appropriates $200 million for the trust fund. Governor Hickel signed both bills on June 23, 1994.[18]

After a four-day evidentiary hearing, the court found that the HB 201 settlement was within the range of possible approval and granted preliminary approval. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 58 (July 29, 1994). The proposed settlement was described in detail in the Memorandum Decision and Order

[18]HB 201 became Chapter 5, FSSLA 1994, and HB 371 became Chapter 6, FSSLA 1994. Because the label "HB 201" has been used in other documents, the court will continue to refer to this settlement as the "HB 201 settlement" in order to avoid confusion.

regarding preliminary approval.[19] Id. at 13-19. However, the court identified several problems which could potentially prevent final approval. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 31-41 (July 29, 1994). Governor Hickel called a second special session of the legislature in September 1994, to give the legislature an opportunity to amend HB 201 and HB 371 before the court made a decision regarding final approval. See Ch. 1, SSSLA 1994; Ch. 2, SSSLA 1994. The legislature passed the amendments as submitted by the Governor.

One of the major amendments made during the second special session changed the deadline and conditions for the effective date of the settlement provisions of HB 201. The legislature eliminated the requirement that all appeals must be resolved before the December 15 deadline in order for the settlement provisions to become effective and for the repeal of Chapter 66 to be prevented. See Ch. 1 § 2, SSSLA 1994, amending Ch. 66 § 58, SLA 1991, as repealed and reenacted by Ch. 5 § 37, FSSLA 1994. As long as final approval of the settlement and dismissal of the case by the superior court occurs no later than December 15, 1994, the settlement will become effective. While those opposed to settlement still may appeal final approval, such an appeal can no longer automatically destroy the entire settlement.

A second major change corrected and amended the lands lists incorporated into HB 201. See Ch. 1 §§ 4-7, SSSLA 1994; Ch. 5 § 40, FSSLA 1994 (HB 201). The corrections added 122 parcels with approximately 190,955 acres and deleted 85 parcels with approximately 124,209 acres. The Salcha mineral parcel[20]

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[19]Of course, this description does not include the September 1994 amendments to HB 201. Those amendments are described below.

[20]The original Salcha mineral parcel had not been tentatively approved for transfer from the federal government to the state because of military use of the parcel. In addition, there were reportedly hazardous waste sites located on the parcel that would have posed a significant liability risk for the trust.

was replaced with the mineral estate in nearby parcels, which present fewer problems and greater value.[21]

The court had expressed concern that the state land contract portfolio could not be sold for the $25 million stated in HB 371. In that event, the full $200 million would not be available for the trust fund as compensation for some of the original trust lands not returned. Alternative funding sources for the $200 million appropriation to the trust fund were identified in the event the sources originally designated in HB 371 prove to be inadequate. See Ch. 2, SSSLA 1994. This was enacted to resolve the uncertainty in whether the class would get the benefit of their bargain with regard to the $200 million cash payment to the trust.

D. Description of HB 201 Settlement

The settlement components of HB 201 are contained in sections 3 through 9, 12 through 40, 43, 46, 47, 50, and 51. See Ch. 5, FSSLA 1994 and amendments in Ch. 1, SSSLA 1994. HB 371 contains a total appropriation of $200 million to the trust fund. See Ch. 6, FSSLA 1994 and amendments in Ch. 2, SSSLA 1994. The settlement components in Chapter 66 are contained in sections 2 through 48, 51, 52, and 58.[22] Ch. 66, SLA 1991.

Section 40 of HB 201 reconstitutes the trust with a combination of "Original Mental Health Land" and "Other State Land."[23] Ch. 5 § 40(a), FSSLA 1994. Some of the approximately

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[21]The parcels replacing the Salcha mineral parcel were part of a land exchange agreement between the State and Messrs. Volland and Jessee. See H.L.'s Notice of Resolution of Salcha Exchange (Sept. 22, 1994).

[22]HB 201 repealed parts of Chapter 66: AS 37.14.009(b) in section 10; AS 37.14.036(c) in section 11; AS 47.30.031(b)(2) in section 26; sections 49, 50, and 53 through 57. Ch. 5 § 39, FSSLA 1994.

[23]For the purpose of reconstituting the trust, the following land was designated in HB 201 as mental health trust land:

(1) the original mental health land listed in "Original Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended by the additions and deletions listed in the September 23, 1994, addendum to the April 28, 1994, list described in this paragraph, both of which

995,502 acres in the reconstituted trust will not be held in fee simple.[24] Only the subsurface estate of approximately 341,421 acres is conveyed to the reconstituted trust. Only the hydrocarbon (oil and gas) interest of approximately 104,286 acres is conveyed to the reconstituted trust. Approximately 549,795 acres in fee simple are conveyed to the reconstituted trust.

Approximately 568,814 acres of the 995,502 acres in the reconstituted trust are "Original Mental Health Land." This "Original Mental Health Land," which is returned to the trust, is composed of approximately 434,456 acres in fee simple, 55,792 acres of only subsurface estate, and 78,566 acres of only hydrocarbon interest.[25] The "Original Mental Health Land" in the reconstituted trust is primarily located near the urban areas in Southeast Alaska, in the Anchorage/Kenai Peninsula area, and near Cape Yakataga, Tyonek, Lake Minchumina, Healy, Anderson, Nenana, and Fairbanks.

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are located in the office of the director of lands, Department of Natural Resources, in Anchorage, Alaska; and

> (2) the state land listed in "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended by the additions and deletions listed in the September 23, 1994, addendum to the April 28, 1994, list described in this paragraph, both of which are located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

Ch. 5 § 40(a), FSSLA 1994, as amended by Ch. 1 § 4, SSSLA 1994.

[24]A fee simple estate includes the entire bundle of possible property rights. It contains both the surface and subsurface estates.

[25]The subsurface estate or hydrocarbon interests are subsurface interests conveyed to the Trust Authority where the surface estate has been conveyed to a third party or another state use, but the surface use is not incompatible with subsurface development. For example, mineral exploration and development is a permitted activity in the Matanuska Valley Moose Range. Thus, the subsurface rights to original mental health trust lands in the Moose Range are returned to the trust.

Under the HB 201 settlement, approximately 556,392 acres[26] of original mental health trust lands will not be returned to the trust. Compensation for these non-returned lands ["NRTL's"] will be composed of: (1) approximately 426,688 acres of "Other State Lands," (2) $200 million placed in a trust fund established for the monetary corpus of the trust, (3) establishment of an Alaska Mental Health Trust Authority to act as trustee, (4) changes in the budgeting process for mental health programs, and (5) the program improvements outlined in Chapter 66, SLA 1991.

The "Other State Lands" which are conveyed include approximately 115,339 acres in fee simple, approximately 285,629 acres of subsurface estate only land, and approximately 25,720 acres in hydrocarbon interest only land. The subsurface and fee simple interests in "Other State Lands" are located primarily southeast of Chena Hot Springs, just north of Fairbanks, northwest of McGrath, in the Livengood area,[27] around Delta Junction, near Tok, northwest of Haines, north of Sitka, and numerous other locations in Southcentral and Southeast Alaska. The hydrocarbon interests are located in the lower Kenai peninsula and lower Susitna Valley. The Salcha replacement mineral parcel comprises more than half the acreage of subsurface estate only land in the "Other State Land" category.[28]

The Settlement Agreement submitted to the court on June 10, 1994, requires most of the land to be conveyed to the Trust Authority prior to final approval of the settlement. Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994). The Agreement

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[26]The Non-Returned Trust Lands are composed of approximately 423,000 acres in fee simple and approximately 133,500 acres of surface estate.

[27]The Livengood area has been the location of mining activity in the past.

[28]A replacement parcel was chosen because there was no assurance that the federal government would ever convey the original Salcha parcel to the State. The replacement parcel is larger than the original parcel and has a value equal to or greater than the original parcel. The replacement parcel was substituted for the original on the list of "Other State Land To Be Designated as Mental Health Trust Land" as part of the amendments passed during the Second Special Session of the Legislature in September 1994.

calls for the State to tender to the court the deeds for conveying to the trust authority the lands to be included in the reconstituted trust prior to dismissal of this action.[29] Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994). Accordingly, the State tendered non-recordable deeds with attached plats on the last day of the fairness hearing.

DNR normally issues patents, which technically are a form of quitclaim deed. The HB 201 calls for the State to issue quitclaim deeds to Trust Authority rather than warranty deeds. However, the State has warranted in the Settlement Agreement that it has legal authorization to convey the land to the Trust Authority. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994). If the warranty is violated, the trust will be compensated with other land. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994).

Mental health trust land selections not yet conveyed to the State by the federal government will be conveyed to the Trust Authority as the State receives them. DNR has agreed to consult the Trust Authority when the annual conveyance priorities are submitted to the Bureau of Land Management. Settlement Agreement, art. IV, § 9, at 11 (June 10, 1994). If such land parcels are different from those described on the lists referenced in HB 201, the State will compensate the trust with other land of a similar character, equal value, and similar revenue-producing potential. Settlement Agreement, art. IV, § 2, at 7 (June 10, 1994).

The Alaska Mental Health Trust Authority, which is created by Chapter 66 to act as trustee for the mental health lands

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[29]The Agreement acknowledges that full legal descriptions may not be available at the time the action is dismissed. Settlement Agreement, art. IV, § 1, at 7. However, the State has agreed to use its best efforts to complete recordable deeds for delivery to the trust authority as soon as practicable after dismissal. Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994). The interim deeds describe parcels by number and reference to maps attached to the interim deeds. The State will bear the recording costs for all documents required by the settlement. Settlement Agreement, art. IV, § 5, at 9-10 (June 10, 1994).

trust,[30] "has a fiduciary obligation to ensure that the assets of the trust are managed consistent with the requirements of the Alaska Mental Health Enabling Act." Ch. 5 § 9, FSSLA 1994; Ch. 66 § 10, SLA 1991, as amended by Ch. 5 § 8, FSSLA 1994; Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 26, FSSLA 1994. The Trust Authority is required to contract with DNR to manage the land assets of the trust. Ch. 5 § 9, FSSLA 1994. A separate unit of DNR must be established whose sole assignment will be to manage the reconstituted land corpus of the trust. Ch. 5 § 22, FSLA 1994.

Section 17 of HB 201 lists the general standards applicable to DNR's management of lands in the reconstituted trust:

> (a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).
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> (b) Subject to (a) of this section, the department
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> > (1) shall manage mental health trust land under those provisions of law applicable to other state land;
> >
> > (2) may exchange other state land for mental health trust land under procedures set out in AS 38.50; and
> >
> > (3) may correct errors or omissions in the legal descriptions of mental health trust land.
>
> (c) The commissioner [of DNR] shall adopt regulations under AS 44.62 (Administrative

[30]A seven-person board of trustees will govern the Trust Authority. Ch. 66 § 26, SLA 1994 (to be codified as AS 47.30.016(b)). Board members must be appointed by the governor and confirmed by the legislature. Ch. 5 § 24, FSSLA 1994.

> Procedures Act) to implement this section. The regulations adopted under this subsection must, at a minimum, address
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> (1) maintenance of the trust land base;
>
> (2) management for the benefit of the trust;
>
> (3) management for long-term sustained yield of products from the land; and
>
> (4) management for multiple use of trust land.

Ch. 5 § 17, FSSLA 1994 (to be codified as AS 38.05.801). The four management provisions which must be addressed in the regulations are based on a law review article discussing management principles for public trust lands. See Fairfax, Souder, & Goldenman, The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. 797, 900-908 (1992). The regulations for DNR's management of trust lands will be adopted through the usual public rulemaking procedures during which the beneficiaries and the public will have an opportunity to comment. See Ch. 5 § 17, FSSLA 1994 (to be codified as AS 38.05.801(c)). In addition, DNR is required to consult the Trust Authority before adopting regulations for the management of trust land. See Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(2)(B)).

The Settlement Agreement requires DNR to "consult a transition team of representatives from the beneficiary community" during the development of the initial policies and procedures for the DNR unit managing trust land. Settlement Agreement, art. V, § 6, at 13-14 (June 10, 1994). DNR Commissioner Harry Noah has been consulting with the transition team. This arrangement seems to be working well. Final Hearing (Oct. 25, 1994). Section 9 of HB 201 includes DNR's general obligations to the Trust

Authority. When DNR manages trust land under a contract with the Trust Authority, DNR is required to:

> (A) manage in conformity with AS 38.05.801;
>
> (B) consult with the authority before adopting regulations under AS 38.05.801(c);
>
> (C) provide notice to, and consult with, the authority regarding all proposed actions subject to public notice under AS 38.05.945 before giving that public notice;
>
> (D) annually provide the authority with a report including
>
> > (i) a description of all land management activities undertaken under this section during the prior year;
> >
> > (ii) an accounting of all income and proceeds generated from mental health trust land;
> >
> > (iii) an explanation of the manner in which the income and proceeds were allocated between the mental health trust fund and the mental health trust income account; and
>
> (E) obtain the approval of the authority before exchanging mental health trust land under AS 38.05.801(b)(2).

Ch. 5 § 9, FSSLA 1994.

HB 201 designates the Alaska Permanent Fund Corporation to manage the investment of the monetary corpus of

the trust, the "mental health trust fund," which will receive the $200 million cash payment from the State.[31] Ch. 5 §§ 3 and 9, FSSLA 1994. Both DNR and the Permanent Fund Corporation must keep the Trust Authority informed with regularly published reports.[32] Ch. 5 §§ 3 and 9, FSSLA 1994.

Earnings from the trust fund and the trust lands must be deposited in a trust income account. Ch. 5 §§ 3, 14, and 15, FSSLA 1994. The Trust Authority will administer the income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.039(a)). The Trust Authority is required to use money from the trust income account for providing an integrated comprehensive mental health program, offsetting the effects of inflation on the trust fund, and meeting the necessary administrative expenses of the Trust Authority. Ch. 5 § 28, FSSLA 1994 (to be codified as AS 47.30.056(a)). Among other things, the money in the income account also may be used to reimburse the Permanent Fund Corporation and DNR for the cost of managing trust assets, to award grants and contracts for mental health programs, to obtain private and federal grants and to solicit gifts, bequests, and contributions for the mental health program. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041(a)).

The Settlement Agreement expressly states the Trust Authority will have the power to allocate money from the trust income account without further legislative involvement.[33]

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[31]The principal of the trust fund is to be "retained perpetually in the fund for investment by the Alaska Permanent Fund Corporation." Ch. 5 § 14 (to be codified as AS 37.14.035(a)). The Trust Authority is required to contract with the Alaska Permanent Fund Corporation for management of the mental health trust fund. Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(3)).

[32]DNR must provide an annual report to the Trust Authority that includes: (1) a description of all land management activities undertaken during the prior year; (2) an accounting of all income and proceeds generated from mental health trust land; and (3) an explanation of the manner in which the income and proceeds were allocated between the corpus and income of the trust. Ch. 5 § 9, FSSLA 1994 (to be codified as AS 37.14.009(a)(2)(D)).

[33]

Settlement Agreement, art. V, § 4, at 12 (June 10, 1994). Section 16 of HB 201 states that the income account will be administered by the Trust Authority and lists the specific uses for which money from the trust income account may be used and the requirements for grants and contracts awarded by the Trust Authority to further the mental health program.[34] See Ch. 5 § 16, FSSLA 1994.

Under Chapter 66 and HB 201, each of the four major beneficiary groups will be represented by their own advocacy group for purposes of planning services and making budget recommendations to the Trust Authority. See, e.g., Ch. 66 § 26 (to be codified as AS 47.30.036(2)-(3)) and § 39 (to be codified as AS 47.30.666), SLA 1991, as amended by Ch. 5 § 35, FSSLA 1994. The four advocacy groups are the Older Alaskans Commission, the Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, and the Advisory Board on Alcoholism and Drug Abuse. See Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.016(b)(2)(A)-(D)). A member from each group also will be on the panel established to advise the governor regarding appointments to the board of trustees of the Trust Authority. The six-member panel will consist of one person selected by each of the following: (1) the Alaska Mental

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> Except for the administrative expenses of the Authority subject to the Executive Budget Act under Section 16 of HB 201, and to the fullest extent consistent with the Alaska Constitution, the Trust Authority may use the money in the income account for the purposes authorized in Section 16 of HB 201 without, and free of, further legislative appropriation.

Settlement Agreement, art. V, § 4, at 12 (June 10, 1994).

[34]Attorneys for Weiss and AMHA submitted a draft letter of intent to the legislature in the Second Special Session, stating that the legislature intended the Trust Authority to have the power to make expenditures from the trust income account without legislative appropriation. Final Hearing, Weiss Exh. 18. The letter was not adopted by the legislature. The court does not believe that the legislature's refusal to adopt the proposed letter of intent can be interpreted as an expression of contrary legislative intent. The Second Special Session was called for a particular purpose; the attorney general's office ultimately determined that the letter of intent went beyond the call.

Health Board, (2) the Governor's Council on Disabilities and Special Education, (3) the Advisory Board on Alcoholism and Drug Abuse, (4) the Older Alaskans Commission, (5) the Alaska Native Health Board, and (6) the Trust Authority. Ch. 66 § 26, SLA 1991, as amended by Ch. 5 § 24, FSSLA 1994 (to be codified as AS 47.30.016(b)). The Trust Authority must consider the recommendations submitted by the four advocacy groups and coordinate the state agencies involved with the mental health program when forming budget recommendations for the state's comprehensive mental health program. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.036(2)-(3)).

HB 201 requires the governor to submit to the legislature a separate appropriations bill limited to the comprehensive mental health program. Ch. 5 § 4, FSSLA 1994. Similarly, the legislature is required to pass appropriations for the program in a separate bill. Ch. 5 § 7, FSSLA 1994. If the bill submitted by the governor or passed by the legislature differs from the Trust Authority's recommendations for appropriations from the state's general fund, a report must accompany the bill explaining the reasons for the differences. Ch. 5 §§ 5 and 7, FSSLA 1994. The governor must make a similar explanation of any veto of an appropriation for the state's comprehensive mental health program. Ch. 5 § 6, FSSLA 1994.

By January 1, 1996, the Trust Authority must have adopted regulations regarding (1) persons who are to receive services funded by trust income and (2) the services and facilities upon which expenditures are to be made from money in the trust income account.[35] Ch. 5 § 43, FSSLA 1994. The Trust Authority's task is aided by the detailed definitions in Chapter 66. See Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(b)-(j)).[36] The persons who are to receive services funded by the trust income account, the

[35]The Trust Authority also must publish estimates regarding the number of persons in need of the services funded by the trust income account and projections of the necessary expenditures for from the trust income account by January 1, 1996. Ch. 5 § 43, FSSLA 1994.

[36]AS 47.30.056(a) added by Chapter 66 was amended by section 28 of HB 201.

beneficiaries, are defined by several diagnoses within each of the four beneficiary groups identified by the court in 1988. See Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(d)-(g)). Priority in service delivery among the beneficiaries must be given to individuals who (A) may require or are at risk of hospitalization, or (B) experience such major impairment of self-care, self-direction, or social and economic functioning that they require continuing or intensive services. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(b)-(c)). Chapter 66 defines "integrated comprehensive mental health program" in terms of a wide variety of possible services. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(i)). Services are also addressed in amendments to the Community Mental Health Services Act, which focuses on community based services. Ch. 66 §§ 28-35, SLA 1991 (to be codified as AS 47.30.520-.610), as amended by Ch. 5 §§ 30-32, FSSLA 1994.

Chapter 66 and HB 201 both amend AS 47.30.660, which outlines the general responsibilities of the Department of Health and Social Services ("DHSS") with regard to the state's mental health program. See Ch. 66 § 36, SLA 1991; Ch. 5 § 33, FSSLA 1994. Chapter 66 requires DHSS to plan for "an integrated comprehensive mental health program" in conjunction with the Trust Authority and, through the Division of Mental Health and Developmental Disabilities, administer a comprehensive program of services. Ch. 66 § 36, SLA 1991. HB 201 clarified that DHSS's duty to implement an integrated comprehensive system of mental health care which meets the needs of trust beneficiaries was constrained by "the limits of money appropriated for that purpose and using grants and contracts that are to be paid for from the mental health trust income account." Ch. 5 § 33, FSSLA 1994 (to be codified as AS 47.30.660(a)(3)).

III. DEFINITION OF THE CLASS

This case was certified as a class action under Alaska Civil Rule 23(b)(2). Order Certifying Action as Class Suit under Civil Rule 23(b)(2) (Jan. 26, 1983) (Judge Taylor). Class action lawsuits

are "(b)(2)" actions when only injunctive or declaratory relief with respect to the class as a whole has been requested, and no monetary relief will be distributed to individual class members.[37] The relief sought in this case is reconstitution of the mental health lands trust with the hope that this will lead to improved state mental health services. Individual compensation to class members has never been contemplated. Relief in a (b)(2) action is focused on the class as a whole, therefore class members do not have the right to opt out of the action or a settlement of it. In addition, no member or segment of the class has veto power over a settlement, although the court must carefully consider substantial objections as an indication that a settlement might not be fair to the class.

In 1983, the class was defined in accordance with the original complaint, which stated that the plaintiffs were recipients of state mental health services who needed continuing services that were not available in the State of Alaska. Order Certifying Action as Class Suit under Civil Rule 23(b)(2) (Jan. 26, 1983) (Judge Taylor); Complaint, at 1 (Nov. 26, 1982). In 1987, Bosel moved for a declaration that mentally retarded and mentally defective individuals were among the intended beneficiaries of the trust when it was established in 1956. See Bosel's Motion for Partial Summary Judgment (July 14, 1987). In response to Bosel's motion and

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[37]The pertinent portions of Alaska Civil Rule 23 provide:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> (2) The party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

extensive briefing, the court determined that the beneficiaries were composed of at least "those individuals suffering from psychiatric illness who may require hospitalization and the mentally defective and retarded" including "chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness." Memorandum Decision and Order, at 17 & n.6 (April 27, 1988).[38]

The class definition was modified August 2, 1994. The class was redefined as

> all persons who are past, present and future beneficiaries of the mental health lands trust created by Congress in the Alaska Mental Health Enabling Act of 1956. The beneficiaries are residents of the State of Alaska who are mentally ill, mentally defective or retarded, chronically alcoholic suffering from psychoses, senile and as a result of such senility suffer major mental illness, and such other persons needing mental health services as the legislature may determine.

Order Modifying Class Definition, at 1-2 (Aug. 2, 1994). Section 26 of Chapter 66, which will become effective Dec. 16, 1994, defines each of the four main categories of beneficiaries. Ch. 66 § 26, SLA 1991.[39]

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[38]In addition, the court concluded that it was within the discretion of the legislature to include other groups as recipients of services by mental health programs, as long as the groups specifically described in the court's order were not excluded. Memorandum Decision and Order, at 17 (April 27, 1988).

[39]In section 26, "the mentally ill" includes persons with: (1) schizophrenia; (2) delusional (paranoid) disorder; (3) mood disorders; (4) anxiety disorders; (5) somatoform disorders; (6) organic mental disorders; (7) personality disorders; (8) dissociative disorders; (9) other psychotic or severe and persistent mental disorders manifested by behavioral changes and symptoms of comparable severity to those manifested by persons with the other listed mental disorders; (10) persons who have been diagnosed by a licensed psychologist, psychiatrist, or physician licensed to practice medicine in the state and, as a result of the diagnosis, have been

IV. NOTICE

Alaska Civil Rule 23(e) requires that notice of a settlement be sent to members of the class in whatever manner the court directs.[40] Alaska R. Civ. P. 23(e). Notice to the class of a proposed settlement and the fairness hearing assures class members (1) an opportunity to support or oppose the settlement and to alert the court to provisions in the settlement that may be contrary to the interests of the class as a whole or subgroups within the class; and (2) that their "integrity and right to express views and be heard on matters of vital personal interest has not been violated by others

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determined to have a childhood disorder manifested by behaviors or symptoms suggesting risk of developing a mental disorder listed above. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(d)).

"Mentally defective and retarded" includes persons with: (1) cerebral palsy; (2) epilepsy; (3) mental retardation; (4) autistic disorder; (5) severe organic brain impairment; (6) significant developmental delay during early childhood indicating risk of developing a disorder listed above; (7) other severe and persistent mental disorders manifested by behaviors and symptoms similar to those manifested by persons with disorders listed above. Ch. 66 § 26 SLA 1991 (to be codified as AS 47.30.056(e)).

"Chronic alcoholics suffering from psychoses" includes persons with: (1) alcohol withdrawal delirium (delirium tremens); (2) alcohol hallucinosis; (3) alcohol amnestic disorder; (4) dementia associated with alcoholism; (5) alcohol-induced organic mental disorder; (6) alcoholic depressive disorder; (7) other severe and persistent disorders associated with a history of prolonged or excessive drinking or episodes of drinking out of control and manifested by behavioral changes and symptoms similar to those manifested by persons with the disorders listed above. Ch. 66 § 26 SLA 1991 (to be codified as AS 47.30.056(f)).

"Senile people who as a result of their senility suffer major mental illness" includes persons with: (1) primary degenerative dementia of the Alzheimer type; (2) multi-infarct dementia; (3) senile dementia; (4) presenile dementia; (5) other severe and persistent mental disorders manifested by behaviors and symptoms similar to those manifested by persons with the disorders listed above. Ch. 66 § 26, SLA 1991 (to be codified as AS 47.30.056(g)).

[40]The Civil Rule 23(e) notice requirement is based in part on due process because the settlement of a class action will have res judicata effects on all class members. In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 759 (E.D.N.Y. 1984), citing Grunin v. International House of Pancakes, 513 F.2d 114, 120 (8th Cir.), cert. denied, 423 U.S. 864, 96 S. Ct. 124, 46 L.Ed.2d 93 (1975).

who abrogated to themselves the power to speak and bind without consultation and consent." In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 758 (E.D.N.Y. 1984).

Individual notice to every class member of a (b)(2) class is not necessary as long as a representative portion of the class or their guardians are contacted, because members of the class cannot opt out of the class or settlement and identification of all class members may be difficult. See, e.g., Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 963 (3rd Cir. 1983); Harris v. Pernsley, 654 F. Supp. 1042, 1048 (E.D. Pa. 1987). Sometimes notice by publication is sufficient to satisfy constitutional due process requirements in a (b)(2) action. See, e.g., Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir. 1980). The court must consider the nature of the class and the case when the court decides the appropriate form and content of notice and the method of distribution. This is a reason why the specific manner of giving notice of a proposed settlement is left to the discretion of the trial court. The court decided that notice only by publication would have been inadequate in this case, given the limitations and special needs of many class members.

In the present case, the balance between providing enough information for the class to evaluate the settlement and making the notice understandable to as many class members as possible was a difficult one. See Newberg on Class Actions § 8.32, at 8-103 to 8-104 (3d ed. 1992). The text was kept as simple and as short as possible given the constraints of accuracy and completeness. See id. A few written comments stated the notice did not provide sufficient information. Others complained that the notice was too long and complex for most class members to understand.

Other sources of information were listed for those who wanted more information. The names and phone numbers of attorneys for the class were provided in the notice. The court also made available a public information sheet explaining that the court file for this case encompassed over 100 volumes and listing the

volumes which contained documents relevant to the HB 201 settlement.

The court recognized that the notice would be too detailed for some class members. Family members, guardians, or other advocates for class members were relied upon to explain the notice to class members or otherwise to represent the interests of individual class members.

The fact that the class was defined in terms of those who suffer from mental illness, alcoholism, mental retardation, and senility made direct notice to individually identified class members impossible. The stigma that mental illness continues to carry in American society raises issues of class members' right to privacy under article I, section 22 of the Alaska Constitution. The Alaska Supreme Court has recognized that psychiatric or psychological treatment is information which patients would normally seek to keep private. Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469, 480 (Alaska 1977). The simple release of names and addresses of patients by mental health service providers would reveal that those individuals had sought treatment for a mental illness. This would violate the patients' right to privacy and the confidentiality of communication between physician/psychotherapist and patient. See Falcon, 570 P.2d at 479-80; accord Ziegler v. Superior Court for the County of Pima, 656 P.2d 1251, 1255-56 (Ariz. Ct. App. 1982).

Direct notice to all class members was impossible for other reasons as well. The current addresses of past trust beneficiaries could be difficult to ascertain and individual identification of future beneficiaries who are not presently receiving services would be impossible. See Harris v. Pernsley, 654 F.Supp. at 1048. The solution proposed by some of the parties and adopted by the court was a mass mailing to all Alaskan addresses. This provided actual notice to approximately 270,000 addresses.

The mass mailing had the advantage of reaching potential class members in even the smallest villages served by the United

States Postal Service. Publication alone could not accomplish this. In addition, the mailed notice included a comment form to encourage recipients of the notice to comment on the proposed settlement. On August 2, 1994 the court approved the text of the notice to be given by mass mailing. By August 19, 1994, the notices had been sent by third-class mail. A copy of the notice is in Appendix A. The plaintiffs' attorneys provided versions of the notice on audio cassette, in Braille, large print, Spanish, Filipino, Inupiaq, and Yupik. These versions of the notice were made available upon request or in public areas along with the standard English version.

Beginning August 12, 1994, the State published the court-approved notice one time per week for three consecutive weeks in each of Alaska's 23 largest newspapers, with four minor variations in this schedule.[41] The complete text of the notice was published in a legal advertisement along with a display advertisement located in another part of the same edition drawing attention to the legal notice. The court approved the text of a large display advertisement on September 23, 1994. The advertisement was four columns (eight inches) wide by twelve inches high. The display advertisement was published four consecutive weeks in the Sunday edition of the Anchorage Daily News, the Fairbanks Daily News-Miner, and the Juneau Empire beginning September 25 and continuing through October 16, 1994.

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[41]The court's order required publication in the 22 largest newspapers. The State ranked newspapers by total paid subscribers as listed by the Alaska Journal of Commerce Book of Lists 1994 at page 21. When the notice was published, however, the Prince William Sounder, had divided into two newspapers, the Valdez Vanguard and the Cordova Times. This brought the total to 23 newspapers in which the notice was published.

The advertisements were printed in the Alaska Journal of Commerce on August 22 and 29, and September 5, 1994. Because the Tundra Times publishes every other Wednesday, advertisements were printed on August 24, September 7 and September 21, 1994. The Senior Voice is published only monthly, and advertisements were published in the September and October issues. The Southeast Alaska Business Journal also publishes monthly, and advertisements were published in the August and September issues.

Public service announcements were sent to all radio and television stations in Alaska by the middle of September. The public service announcements briefly informed listeners of the existence of the settlement and where more information could be obtained. An additional information sheet written by the State was available at DNR Information Offices and Legislative Information Offices.

The State was also required to send notices to providers of mental health, alcoholism, and homeless services by the end of August 1994. Accordingly, around August 24, 1994, the State sent notices to approximately 1,400 providers[42] of mental health, alcoholism, and homeless services, including shelters, soup kitchens and other programs designed to assist homeless people. Posters accompanying the notices were made from enlarged versions of the notice. A letter was included requesting the provider to distribute the notices to current clients and other interested persons. Notices were also provided to and distributed by the Alaska Department of Corrections in the state's correctional facilities in order to notify those inmates who are also class members.

Plaintiffs' attorneys and advocacy groups held a few meetings for beneficiaries and their families or guardians to explain the settlement and to answer questions about it. In addition, because this is a high-profile case, news reports in both the print and broadcast media provided the public with some information about the proposed settlement and the legislature's actions with regard to the settlement.

Notice to the class started in mid-August and lasted until October 16, 1994, a total of nine weeks. The period for receiving written comments continued through October 21, 1994. Notice was first sent ten weeks prior to October 24, when the final

[42]The list of providers was compiled by Jeff Jessee, counsel for Bosel.

approval hearing began in Anchorage. Therefore, a reasonable[43] time period was provided between notice and final hearing, during which class members and their families or other representatives could investigate the settlement further and reflect on the matter before taking a position. See In re Agent Orange, 597 F. Supp. at 759.

V. FINAL APPROVAL

A. Standard

Final approval requires that the settlement as a whole be "fair, adequate, and reasonable."[44] Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992); Newberg on Class Actions § 11.41, at 11-91 (3d ed. 1992). However, a "settlement need not provide the best or speediest relief imaginable to be fair, adequate, and reasonable." Officers for Justice, 688 F.2d 615, 636 (9th Cir. 1982). In evaluating the fairness of a settlement, it must be remembered that "compromise is the essence of a settlement."

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[43]What constitutes a "reasonable time" varies from case to case. Agent Orange, 597 F. Supp. at 759; see Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). The length of time seems to vary from approximately two weeks to three months. See, e.g., Ruiz v. McKaskle, 724 F.2d 1149, 1152 (5th Cir. 1984) (30 days); Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 961 (3rd Cir. 1983) (one month); Williams, 720 F.2d at 921 (two weeks is a minimum); Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir. 1982)(six weeks); Mendoza v. United States, 623 F.2d 1338, 1348 (9th Cir. 1980) (nearly a month); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977) (26 days); Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 838 (9th Cir. 1976) (one month); Grunin v. International House of Pancakes, 513 F.2d at 121 (19 days); Agent Orange, 597 F.Supp. at 759-60 (three months); Bronson v. Board of Education, 604 F. Supp. 68, 72 (S.D. Ohio 1984) (approximately 20 days).

[44]Preliminary approval is not a fairness determination. It is a finding by the court that the proposed settlement is sufficiently within the range of possible approval to justify notifying of the class and proceeding with a final approval hearing. Armstrong v. Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980). Final approval of the settlement remains discretionary with the court even after preliminary approval is granted. See Newberg on Class Actions §11.41, at 11-88 (3d ed. 1992).

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).[45] Every concern of the class need not be satisfied in order for a settlement to be fair. Alliance to End Repression v. City of Chicago, 91 F.R.D. 182, 195 (N.D. Ill. 1981). A fair settlement may fall anywhere within a broad range of upper and lower limits. See Alliance to End Repression, 91 F.R.D. at 195.

Factors which courts usually consider in deciding whether to grant final approval include:

> (A) comparison between the likely result of litigation and the remedy in the settlement;
>
> (B) expense, complexity, and likely duration of further litigation;
>
> (C) reaction of the class to the settlement, number of objectors, and nature of objections;
>
> (D) experience and views of counsel;
>
> (E) defendant's ability to pay (feasibility of settlement);
>
> (F) extent of discovery completed; and
>
> (G) presence of collusion in settlement negotiations.[46]

See Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; Malchman v. Davis, 706 F.2d 426, 433-34 (2nd Cir. 1983); Armstrong v.

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[45]A settlement may compromise some potential remedies available to the class, if as a whole the settlement is fair, reasonable, and adequate. Armstrong v. Board of School Directors, 616 F.2d 305, 317 (7th Cir. 1980).

[46]The court conducted an evidentiary hearing in July concerning the presence or absence of collusion in reaching the settlement. The court found no evidence of collusion in the negotiations. No further evidence or allegations regarding the conduct of negotiations have arisen. The court will not discuss this factor further. The earlier determination of no collusion stands.

Board of School Directors, 616 F.2d 305, 314 (7th Cir. 1980); Newberg on Class Actions § 11.43, at 11-97. The relative degree of importance attached to each factor depends upon the claims, facts, and circumstances of each case.[47] Officers of Justice v. Civil Service Comm'n., 688 F.2d 615, 625 (9th Cir. 1982).

Most of these factors were discussed in the court's decision granting preliminary approval. See Memorandum Decision and Order, at 45-57 (July 29, 1994). The court specifically found no evidence of collusion or any other significant impropriety in the negotiation process. Id. at 23-30, 57. The preliminary approval decision also identified several concerns of the court that potentially could prevent final approval. Id. at 31-42. Therefore, the court has focused on these factors in deciding whether to grant final approval: (1) the extent to which problems identified by the court in the decision regarding preliminary approval have been resolved; (2) a comparison between the settlement and further litigation[48] including the expense, duration, and complexity of trial litigation; and (3) the nature and amount of class opposition to the settlement. See Memorandum Decision and Order Re: Preliminary Approval of HB 201 Proposed Settlement Agreement, at 31-57 (July 29, 1994). Other factors are discussed more briefly.

It must be remembered that the court is reviewing a class settlement proposal rather than ordering a remedy in a litigated case. Armstrong, 616 F.2d at 314-15. The court did not undertake the kind of detailed and thorough investigation that it would undertake if it were actually trying the case.[49] See Armstrong, 616

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[47]For example, where no monetary relief is sought, the defendant's ability to pay of no importance, although the feasibility of the requested relief may remain relevant.

[48]This includes an evaluation of the difficulties in proving the plaintiffs' claims to land in which third-parties have an interest and the strength of the State's claim to a setoff for past mental health expenditures.

[49]In this case, the final hearing lasted two full weeks. However, a trial of the same factual issues undoubtedly would have lasted much longer, and a trial of the entire case would involve many additional factual and legal issues. Cf. Officers of Justice, 688 F.2d at 625 (final hearing should not be turned into a trial or rehearsal for trial on the merits).

F.2d at 315. Nothing in this Memorandum Decision can be viewed as a judgment with regard to the ultimate factual and legal issues underlying the merits of the present litigation.

The court's role in determining whether a settlement is fair, adequate, and reasonable is limited to the minimum necessary to protect the interests of the class. Armstrong, 616 F.2d at 315; Holden v. Burlington Northern, 665 F.Supp. 1398, 1406 (D. Minn. 1987). A court may not substitute its own judgment regarding the optimal possible settlement for the judgment of the litigants and their counsel. Armstrong, 616 F.2d at 315; In re Agent Orange, 597 F.Supp. at 759. A proposed settlement should not be judged against some hypothetical ideal of what might have been achieved in the best possible negotiations. Officers of Justice, 688 F.2d at 625; In re Agent Orange, 597 F.Supp. at 762. It also should not be judged in comparison with the maximum possible recovery if the class succeeded in all claims. See In re Agent Orange, 597 F.Supp. at 762. The risks accompanying continuation of litigation must be considered simultaneously with the strengths of class' case. Holden v. Burlington Northern, Inc., 665 F.Supp. at 1408; see also In re Agent Orange, 597 F.Supp. at 762 (settlement judged in light of the strengths and weaknesses of plaintiffs' case"). A settlement is a bilateral compromise in which certain rights or benefits are given up in return for others, where both sides gain as well as lose something. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1135 (7th Cir. 1979).

Settlement involves compromise on both sides even when the liability of the defendant has already been established, as it has here. There may be a tendency for many class members to object to any compromise in the remedial portion of a case once liability is established. See Armstrong, 616 F.2d at 316. Understandably, a compromise on the remedy may appear to be allowing the defendant to escape with little penalty while leaving the class inadequately compensated. Yet in some class actions, such as this one, the remedial portion of the case can surpass the liability portion in terms of complexity and duration. See Armstrong, 616

F.2d at 324. In such cases, compromise on the remedial issue after the defendant is held to be liable may indeed be quite reasonable.

B. Burden of Proof

The parties do not agree regarding the appropriate burden of proof[50] for final approval.[51] The Alaska Supreme Court has not ruled on this specific issue.

Proponents of the settlement have the burden of providing the court with sufficient background and other information about the case to enable the court to evaluate the settlement. Newberg on Class Actions § 11.42, at 11-94 to 11-95; MCL 2d § 30.44, at 241-42 ("the burden is on the proponents to show that the settlement should be approved"); accord In re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 312 (N.D. Ga. 1993); Steiner v. Fruehauf Corp., 121 F.R.D. 304, 306 (E.D. Mich. 1988); Wattleton v. Ladish, 89 F.R.D. 677, 680 (E.D. Wis. 1981). Because settling plaintiffs and settling defendants in a class action are both proponents of the settlement, they are no longer adversaries with respect to the request for court approval of the settlement. Newberg on Class Actions § 11.42, at 11-94 to 11-95. In a class action the court always has the responsibility of protecting the class because of the opportunities for abuse peculiar

[50]The burden of proof in this context is not the burden of proving the merits of the parties' claims or defenses. The most important factor in final approval is a comparison between the likely results of further litigation with the likely results of the proposed settlement in order to determine the adequacy of the settlement for the class. The overall burden of proof for final approval relates to the fairness, adequacy, and reasonableness of the settlement.

[51]The United States v. Oregon, 913 F.2d 576 (9th Cir. 1990), has been cited by the State for the proposition that the burden of proof should be on opponents of a settlement. See State's Opening Pre-Hearing Mem. Sup. Final Approval, at 3 n.2 (Oct. 11, 1994), citing U.S. v. Oregon, 913 F.2d 576, 579-80 (9th Cir. 1980), cert. denied Makah Indian Tribe v. United States, 501 U.S. 1250 (1991). Counsel for Weiss and AMHA have cited In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), for the proposition that the proponents of the settlement have the burden of proving with clear and convincing evidence that the settlement is fair, adequate and reasonable. Weiss & AMHA's Response Brief, at 7 (Oct. 19, 1994). Neither side is totally correct.

to class actions. See, e.g., In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1122 (7th Cir.), cert. denied, 444 U.S. 870, 62 L.Ed.2d 95 (1979); see also MCL 2d § 30.41, at 236 (court must assure that eagerness of settling parties to avoid trial in a class action does not result in a settlement that is adverse to the interests of some or all class members). In order to assure that the interests of the class are protected, the court must independently analyze the evidence and recommendations. See Newberg on Class Actions § 11.42, at 11-95 to 11-96. Therefore the settling parties have an obligation to furnish adequate information to enable the court to independently reach its own determination of reasonableness, adequacy, and fairness whether or not opposition to the settlement exists. Newberg on Class Actions § 11.42, at 11-96.

At the final approval hearing, "counsel for the settling parties typically are called upon to make an appropriate showing on the record why the settlement should be approved." MCL 2d § 30.42, at 238. The amount of detail with which the settling parties must show why the settlement should be approved depends on the circumstances of the case, particularly opposition among the class. MCL 2d § 30.42, at 238; cf. In re Agent Orange Product Liability Litigation, 597 F.Supp. 740, 761 (E.D.N.Y. 1984) (fairness, reasonableness and adequacy must be judged in light of the "totality of circumstances"); Axinn & Sons Lumber Co. v. Long Island Railroad, 90 F.R.D. 2, 5 (E.D.N.Y. 1979) (where defendant's liability has been established, any party attempting to justify settlement amounting to only a small fraction of the possible recovery has substantial burden of proof).

If there is no evidence of collusion or other improprieties, the burden of proof is on proponents of a settlement to convince the court by a "preponderance of the evidence" that the settlement is fair, reasonable, and adequate.[52] Holden v. Burlington Northern,

[52]Irregularities in negotiations increase the burden. For example, in In re General Motors Corp. Engine Interchange Litigation, the Seventh Circuit stated that "although the proponents of any class settlement always bear the burden of proof on the issue of fairness, proponents who improperly negotiate a settlement

Inc., 665 F.Supp. 1398, 1407 & n.10 (D. Minn. 1987); accord In re General Motors Corp. Engine Interchange Litigation, 594 F.2d at 1126 n.30; Welsch v. Gardebring, 667 F.Supp. 1284, 1290 (D. Minn. 1987).

Some courts have stated that if a settlement is recommended by experienced class counsel after arm's-length bargaining during settlement negotiations, a court may presume the settlement is fair. See In re Union Carbide Corp. Securities Litig., 718 F.Supp. 1099, 1103 (S.D.N.Y. 1989);[53] see also Newberg on Class Actions § 11.42, at 11-94 to 11-95. However, the particular facts here do not support any such presumption. The present case involves strong opposition from half of the class attorneys, one of the original named plaintiffs,[54] and perhaps as much as one-third of the class.

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should bear the heavier burden of establishing fairness by clear and convincing evidence." In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1126 n.30 (7th Cir. 1979).

[53]The Sixth Circuit has indicated that after preliminary approval, a presumption of validity usually should attach to the proposed settlement and objectors then have a heavy burden to demonstrate that the settlement is not fair, reasonable, and adequate. E.g., Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). In a shareholder suit against corporation executives, a district court in Ohio stated:

> The proponents of the settlement have the burden of persuading the Court that the compromise is fair, reasonable and adequate. With the Court's preliminary approval of the stipulation, the proponents satisfy this burden and the settlement is presumptively reasonable. The burden then shifts to the objecting shareholders who have a heavy burden of demonstrating that the decree is unreasonable.

Granada Investments, Inc. v. DWG Corp., 823 F. Supp. 448, 454 (N.D. Ohio 1993)[citations omitted]; see Whitford v. First Nationwide Bank, 147 F.R.D. 135, 138-39 (W.D. Ky. 1992); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 246 (S.D. Ohio 1991); In re Dun & Bradstreet Credit Services Customer Litigation, 130 F.R.D. 366, 370 (S.D. Ohio 1990).

[54]Vern Weiss, father and next friend of Carl Weiss, a minor child when this litigation began, strongly opposes the HB 201 settlement. Final Hearing (Nov. 2, 1994).

Weiss and AMHA have urged the court to impose a burden of persuasion of "clear and convincing" evidence. The only case relied upon by Weiss and AMHA which imposed such a burden did so because of collusion or improprieties during negotiations. See In re General Motors, 594 F.2d at 1126 n.30. The court has rejected that basis here. Moreover, the court does not find any other irregularity which would argue in favor of the higher burden of proof.

The court concludes that during this final approval process, the proponents have the burden of proving by a preponderance of the evidence that HB 201 offers a fair, adequate, and reasonable settlement of this class action.

C. Extent to which Problems Identified by the Court in the Decision Regarding Preliminary Approval Have Been Resolved.

In the preliminary approval decision, the court expressed concern about the likelihood that the State's land contract portfolio could not be sold for the $25 million stated in HB 371.[55] In that event, the full $200 million would not be available for deposit in the trust fund. The amendments passed during the second special legislative session included designation of additional sources of funds if the original sources designated in HB 371 are insufficient. Ch. 2 §§ 4-5, SSSLA 1994. Therefore, the availability of the full $200 million for the trust fund is assured.

HB 201 originally included 116,000 acres of subsurface estate near Salcha in the reconstituted trust that were selected by the State but not tentatively approved by the federal government for conveyance due to a continuing military claim to the land. The legislature deleted this parcel from the list of lands to be included in the reconstituted trust in the second special session. A replacement parcel comprising 184,320 acres of subsurface estate in the same

[55]HB 371 is Ch. 6, FSSLA 1994. HB 371 appropriated money from four different sources to fund the $200 million payment. Ch. 6 § 1, FSSLA 1994.

region was added to the list of trust parcels. Ch. 1 §§ 4-7, SSSLA 1994. All parties agree that this replacement parcel is at least equal in total value to the original 116,000-acre parcel.[56] Therefore, the previous uncertainty over conveyance of approximately one-tenth of acreage of the reconstituted trust has been satisfactorily resolved.

Other corrections to the land lists referenced in HB 201 also were made. Ch. 1 §§ 4-7, SSSLA 1994. Some of the errors had been identified by opponents of the settlement and others were identified by DNR. These corrections were primarily technical in nature and did not significantly affect the value or total acreage of the settlement. However, the land lists accompanying HB 201 are now more accurate.

The legislature eliminated the problem of an appeal potentially destroying the settlement. The condition that all appeals be resolved before the December 15th deadline in order for the settlement provisions of HB 201 to become effective was eliminated in the second special session. Ch. 1 § 2, SSSLA 1994. As long as final approval and dismissal of the case in the superior court occur no later than December 15, 1994, the settlement provisions of HB 201 will become effective.

One problem which still remains is the absence of specific guidance for DNR's management of the reconstituted trust lands. Many class members distrust DNR and are adamantly opposed to management of trust lands by DNR despite the establishment of a separate unit in DNR to manage the lands. In addition, several class members expect mining and other resource development interests to exert heavy influence when DNR adopts regulations for management of trust lands. While both the developers and the trust will desire to make money from land resources, developers and the

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[56]DNR estimated the total value for the original parcel to be $97 million and the total value for the replacement parcel to be $110 million. The mineral consultants hired by proponents and opponents of the settlement both concluded that the total value for the Salcha replacement parcel exceeded the value of the first Salcha parcel. See Final Hearing, Exh. AJ (assessment prepared by Behre Dolbear & Co.) and Exh. AL (Letter from Dr. Paul Metz to David Walker and James Gottstein).

trust beneficiaries will not always have the same goals and interests in the management of these lands.

Improper management on the part of DNR is likely to lead to another lawsuit, something the State would undoubtedly like to avoid. A separate DNR unit managing trust lands will not have the conflicting objectives and policies that may have contributed to the previous failure of DNR to meet its fiduciary duties with respect to trust land. Personnel in a separate unit can be trained in trust land management. Land management decisions within the unit will pertain only to trust land. Within the unit at least, a proposal to sell a trust land parcel will not need to compete with a proposal to sell other state land.

The settlement establishes oversight of DNR management by the Trust Authority. The Trust Authority will essentially be DNR's client. It will be difficult for DNR to justify acting against the advice of the Trust Authority. The actions of the separate DNR trust lands unit are likely to be closely scrutinized by mental health advocates.

When DNR adopts regulations for the mental health trust lands unit, the public and mental health advocates will have an opportunity to comment and, if necessary, challenge the regulations. See generally AS 44.62 (Administrative Procedure Act). HB 201 requires DNR to adopt regulations that implement section 17. Ch. 5 § 17(c), FSSLA 1994. Although section 17 requires DNR to manage trust land under provisions of law applicable to other state land, this is subject to the overriding imperative of managing mental health trust land consistent with the trust principles of the Alaska Mental Health Enabling Act of 1956. Ch. 5 § 17(a)-(b), FSSLA 1994. Any DNR regulation for the separate trust unit that conflicts with the State's trustee responsibilities under the Enabling Act will violate its statutory authority and must fail because of the supremacy of the Enabling Act. Certainly during the process of adopting the first set of regulations for trust land management, the memory of this twelve-

year case will be sufficiently fresh to discourage DNR from adopting regulations adverse to the interests of the trust.

The court finds that problems previously identified as requiring legislative action have been satisfactorily resolved. Of course, the uncertainty over policies and regulations for DNR management of trust lands remains a concern.

D. Settlement Compared to Further Litigation

The most important factor in evaluating the fairness of a class settlement is a comparison between the likely result of further litigation and the remedy provided in the settlement. See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14, 67 L.Ed.2d 59, 67 n.14 (1981). The court must determine "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." MCL 2d § 30.44, at 242. In making this determination, a court must have a grasp of the facts and law involved as well as the possible range of damages the class could recover. In re Agent Orange, 597 F. Supp. at 760. The value of the settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." In re Agent Orange, 597 F. Supp. at 762. At the same time, the court must refrain from turning the settlement approval process into a trial. In re Agent Orange, 597 F. Supp. at 760.

1. The settlement

The HB 201 settlement provides the class with five primary benefits. The mental health lands trust will be reconstituted with some original trust lands and some replacement lands selected from among existing state lands. The Trust Authority is created with responsibility for protecting trust assets and planning and promoting the integrated comprehensive mental health program. The mental health program is given advantages in the budgeting process. The trust is given $200 million in cash. Although the

lands will be managed by DNR, a special unit is created whose exclusive responsibility will be to manage trust lands.

The class will lose its claims to the lands which will not be returned to trust status.[57] It is difficult to determine the value of those lands because of valuation issues. However, for discussion and comparison purposes, the parties have placed these values on the lands which are not being returned to the trust:

Table 1
Lands not returned to trust status (NRTL's)

Category	State's Value (in millions)	Plaintiffs Value (in millions)
Surface lands	443.6	$ 443.6
Mineral lands	122.7	535.4
Timber	26.4	36.5
Coal	38.6	28.9
Hydrocarbon	2.8	2.8
Total	$ 634.1	$ 1,047.2

The class will also give up any claims it may have to damages from mismanagement by the State or from a breach of trust.

The reconstituted land trust will consist of some lands which were original mental health trust lands and some substitute replacement lands. The reconstituted trust will contain a variety of lands valued for timber, coal, minerals, oil and gas, and surface uses:

[57]This statement is not true if the State materially breaches the settlement agreement. In the event of a material breach, the beneficiaries may file a new action reasserting all their claims. The beneficiaries may not be in as good a position as they are today because there may be intervening rights created which would defeat their claims. However, they will not incur any detriment from the fact they dismissed their claims with prejudice.

Timber: Approximately 58,000 acres, including original trust lands at Cape Yakataga and Jackolof Bay and substitute lands at Thorne Bay.

Coal[58]: Approximately 157,000 acres, all unleased original trust lands, located in the Matanuska Valley Moose Range, Healy and Beluga.

Minerals: Approximately 423,000 acres, including original trust lands with fee or mineral only estates in areas near Ketchikan, Juneau, Fairbanks, Healy (California Creek), and Chena Hot Springs, and substitute lands at Livengood, Cleary Summit (Ft. Knox), Ophir, Haines (mineral estate only) and Salcha (mineral estate only).

Oil & Gas: Approximately 106,000 acres, including original trust lands in the Cook Inlet region (hydrocarbon estate only) and substitute lands to replace those lost in the Cook Inlet Regional Corporation ["CIRI"] exchange adjacent to the CIRI lands.

Surface: Approximately 150,000 acres, including almost 36,000 acres in southeast Alaska, more than one-half of which is located near Ketchikan and Petersberg; approximately 52,000 acres in southcentral Alaska, over one-half of which is primarily original trust land in the Matanuska Valley, mostly in the Palmer and Wasilla area; and over 62,000 acres in interior Alaska, over half of which is located in Nenana and Anderson.

Without question, the reconstituted trust is not as valuable as the original mental health trust. Plaintiffs' most optimistic values would value the original trust lands at $1.9 billion and the reconstituted trust at $1.1 billion.[59] Plaintiffs estimate that over

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[58]None of the leased coal lands in the original trust will be returned to the trust. There was no legal impediment to their return.

[59]These numbers are both based on Chapter 66 assumptions and mineral valuation by Dr. Metz. The court believes that both are overstated values.

$900 million of the value of the reconstituted trust is from original trust lands that are being returned. See Exh. AA. Neither side places particularly large values on the substitute lands. These are the approximate values for the substitute lands estimated by the parties[60]:

Table 2
Substitute Lands

Category	State Value (in millions)	Plaintiffs' Value (in millions)
Surface	$ 101.2	$ 101.2
Mineral	182.7	161+
Timber	24.7	26
Coal	.....-	-
Hydrocarbon	2.8	2.8
Total	$ 311.4	$ 291+

A large part of the difference in value between the original trust and the reconstituted trust is in surface value ($443.6 million in non-returned trust lands versus $101.2 million in substitute lands). The trust lands which are not being returned are generally lands where the State conveyed an interest to someone else. With respect to lands chiefly valued for their surface value, this includes primarily the lands now held by municipalities and third party purchasers. These were the lands originally selected as "settlement" lands, that is, the lands near urban areas that the individuals selecting the lands for the trust expected to be sold for growth and surface development. These lands were among the most desirable for immediate sale when the legislature reclassified trust lands as general grant lands. The court considers these valuation numbers to be fairly reliable and the reduction in value to be close to a real dollar loss.

[60]The State's values are found in Exh. Z. The plaintiffs' values are the court's best estimation based on a variety of sources.

The other area of significant decrease between the original trust and the reconstituted trust is in mineral value ($535.4 million in the non-returned trust lands versus $161+ million in the reconstituted trust, using plaintiffs' figures derived from Dr. Metz' valuations). The court does not consider these valuation numbers to be reliable. The court does not believe this reduction in value is a real dollar loss.

The second benefit of the settlement is the creation of the Trust Authority. The court finds that this is a substantial benefit. Under the statute, the Trust Authority will have primary responsibility for overseeing the integrated comprehensive mental health program for Alaska and the mental health trust. The program improvements and the importance of the Trust Authority are the one thing on which all of plaintiffs' attorneys agree; these provisions were developed by interested parties in three years of work. The Trust Authority will be the trustee of the reconstituted trust. It will not manage the land or the mental health trust fund, but it will oversee the management by DNR and the Permanent Fund Corporation. The Trust Authority "has a fiduciary obligation to ensure that the assets of the trust are managed consistent with the requirements of [the Enabling Act]." HB 201 § 9 (to be codified as AS 37.14.009(a)). The Trust Authority will have the power to spend the income from the trust on the integrated comprehensive mental health program according to the intent of the parties to this agreement. See Settlement Agreement, art. V, § 4, at 12 (June 10, 1994). The Board of Trustees of the Trust Authority is to be appointed by the governor and confirmed by the legislature after consideration of a list of persons prepared by a panel composed of individuals selected by the major advocacy groups[61] for the four core beneficiary groups, the Alaska Native Health Board and the Trust Authority. Ch. 5 § 24, FSSLA 1994, amending Ch. 66 § 26, SLA 1991. The Trust Authority must "prepare, and periodically revise and amend, a plan for an

[61]The groups are: the Alaska Mental Health Board, the Governor's Council on Disabilities and Special Education, Advisory Board on Alcoholism and Drug Abuse, and the Older Alaskans Commission.

integrated comprehensive mental health program" in conjunction with the Department of Health and Social Services. Ch. 66 § 36, SLA 1991 (to be codified as AS 47.30.620(a)). It is the court's judgment that even if the reconstituted trust never earns enough money to support the mental health program, the Trust Authority and the program changes made in the statutes should provide real improvements in the lives of the beneficiaries. For this reason, the court considers the Trust Authority with all its powers and its advocacy position to be a fundamental and significant part of this settlement.

The third benefit from the settlement lies in the budgeting advantages found in the legislation. First, the Trust Authority must develop a budget for the integrated comprehensive mental health program. HB 201 § 27 (to be codified as AS 47.30.046(a). Second, if the governor's appropriations bill for funding the mental health program differs from the Trust Authority's budget, the governor must provide a report which explains the reasons for the differences. HB 201 § 5 (to be codified as AS 37.14.003(b)). Third, if an appropriation is vetoed, the governor must explain the veto in light of the Trust Authority's recommendations. HB 201 § 6 (to be codified as AS 37.14.003(c)). Fourth, appropriations for the mental health program must be made in a separate bill limited only to those appropriations. HB 201 § 7 (to be codified as AS 37.14.005(b)). Fifth, the legislature must issue a report explaining any differences between the Trust Authority's recommended general fund budget and the appropriation bill passed. Id. at AS 37.14.005(c).

These budgeting advantages may prove to be significant as the budget for the integrated comprehensive mental health program competes with other needs for general fund appropriations. The mental health budget is given an advantage for inclusion in the governor's budget over the budgets of other state agencies. The mental health budget is given an advantage before the legislature both from its separation from other appropriations and in the required legislative report. Clearly, there are no guarantees of

adequate funding or expanded funding for necessary services, but these budget advantages may prove to be significant nonetheless.

The fourth benefit from the settlement is the payment of $200 million to the trust fund. This cash infusion is extremely significant. First, it ensures that there will be some income for the support of the Trust Authority and whatever programs it decides to fund. Second, it is real money in hand today. In this way it is unlike the other values that are attached to the trust assets. For example, $200 million of mineral value may never produce $1 of income for the trust, because the mineral values are based on probabilities of discovery derived from extremely limited geophysical, geochemical, and geological data with no actual drilling. The results of comparing the $200 million in cash with a royalty stream are interesting. The $200 million is the equivalent of the net present value of an annual royalty stream of $254 million paid with a 10 year start-up delay and a 20% discount rate over the 20 year average life of a mine. It would take $6.3 billion in metallic mineral production each year from these lands to generate that royalty stream.[62] The $200 million is also more valuable than $200 million value in surface estate lands. To compare those two values one must apply an absorption rate and a discount rate to the surface value. Doing so could reduce the surface values to as much as one-tenth to one-fifth of their stated value, thus $200 million surface value in lands may be the equivalent of $20 - 40 million cash in hand.

The fifth benefit of the settlement is the creation of a special unit in DNR whose sole job will be to manage the reconstituted trust lands.[63] The court considers the addition of a

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[62]This example uses a 4% net smelter return royalty. The entire annual metallic mineral production of the United States is $11 billion. If you assume no time delay and use a 10% discount rate, the necessary annual royalty payment would be $23.5 million.

[63]Although listed as a settlement benefit, this provision of HB 201 remains effective even if the settlement fails. See HB 201 §§ 17, 18, 22, and 52. It is listed as a settlement benefit because it may not be achieved through litigation, if the non-settlement provisions of HB 201 are held invalid.

special unit to manage these lands to be an improvement over general management by DNR for several reasons. First, the land managers in the special unit will have a smaller amount of land per person to manage than those in DNR. This should allow managers to be proactive managers instead of passive managers. Second, the special unit members can be trained in the special rules applicable to trust management and will have to apply only those rules and those laws applicable to other state lands which do not conflict with trust management under the Enabling Act. Third, the individuals in the special unit may develop a sense of pride in their special charge.[64]

There are two advantages to settlement not found in the statutes. First, the involvement of the environmental and resource industry interest groups in the negotiation process should assist the trust's development of its lands for income purposes. Where people are involved in the development of a settlement, they are less likely to attack it.[65] Additionally, there should be fewer challenges to the trust's attempts to develop the land because of the agreement of affected parties to the inclusion of the lands in the reconstituted trust. Second, settlement is advantageous because it eliminates the delay that would result from litigation and the cost of further litigation. This case would take years to try, even with the concerted efforts of all participants.[66] The court would have to determine individually whether over 5,000 third party purchasers were bona fide purchasers. The court would have to adjudicate claims to lands given to municipalities, placed in legislatively designated areas, used by state agencies and exchanged for other

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[64]Mr. Erickson described disadvantages he expected from the way in which the special unit is set up with all employees in the "partially exempt" classification. The court disagrees with Mr. Erickson and expects more good than bad to result from the creation of the special unit.

[65]The Chapter 66 experience taught all this lesson. Chapter 66 was attacked by both the public interest and oil company intervenors. Those attacks delayed implementation of and weakened the Chapter 66 settlement.

[66]This is not true if the non-settlement provisions of HB 201 are valid. However, in that case, the appeal from this court's decision could take several years.

lands. The court would have to litigate the extent of the setoff for state expenditures, examining hundreds of appropriations and grants. The court would have to litigate the plaintiffs' claim for lost opportunity damages due to mismanagement of the trust. The delay would be years and the cost to the state would easily be in the millions of dollars. Merely avoiding delay is never a sufficient reason to approve a settlement; it is essential not to "substitute one hour of efficiency for one moment of justice." Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1223 (5th Cir. 1978), cert. denied, 439 U.S. 1115, 59 L.Ed.2d 74 (1979). However, delay in this case is costly for the trust. Every year of litigation is time wasted for the development of trust assets so that they can produce income for the beneficiaries' interest.

2. Litigation

The actual results of litigation are impossible to predict and it would not be proper for the court to actually rule on contested issues. However, it is necessary to analyze the litigation risks present. That is, the court must analyze the strengths and weaknesses of the plaintiffs' case. If plaintiffs won on every issue, the result would be the reconstitution of the trust with all of the original mental health trust lands. The State would either not be able to apply a setoff for state expenditures on the mental health program or the setoff would be neutralized by plaintiffs' claims based on mismanagement of the trust. The trust lands would be managed by DNR, unless the plaintiffs succeeded in removing the State as trustee.[67] There would be no Trust Authority and no program improvements. If the plaintiffs were extremely successful, there might be some cash for the trust from their lost opportunity claims based on mismanagement of the trust. This "best-case" scenario is not very likely. There are significant litigation risks from (a) the non-settlement provisions of HB 201, (b) the determination that some lands are "sold", (c) the application of the setoff for state expenditure on the mental health program, (d) the difficulties of proof of the lost opportunity claim, and (e)

[67]The court does not believe this is very likely.

problems with the valuation of mineral lands. The court will discuss each of these risks.

a. Non-settlement provisions of HB 201

If this case is not dismissed by December 15, 1994, the portions of HB 201 that will be effective would accomplish a legislative reconstitution of the trust with the same lands included in the settlement. The Trust Authority, program improvements, and budget advantages would not be enacted. The $200 million would not be appropriated to the trust. Obviously, if HB 201 is valid, the class is much better off with this settlement.

The State defends the non-settlement provisions of HB 201 under the doctrine of "curative legislation." Weiss and AMHA argue that the statute does not meet the test for curative legislation.

The Alaska Supreme Court has adopted this definition of a curative statute:

> a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which, in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.

Fairbanks North Star Borough v. State, 753 P.2d 1158, 1160 (Alaska 1988), quoting 2 C. Sands, Sutherland Statutory Construction § 41.11 (4th ed. 1973). Legislation must meet a two-pronged test in order to be considered curative of previously enacted invalid legislation:

> (1) the legislature originally must have had the power to authorize the acts done, and

(2) there is no unconstitutional impairment of vested rights as a result of the act's passage.

Fairbanks North Star Borough v. State, 753 P.2d at 1160. If a statute qualifies as a valid curative statute, it is given retroactive effect. Fairbanks North Star Borough v. State, 753 P.2d at 1160. Therefore, actions rendered void prior to passage of the curative statute are legitimized. Id.

It is fairly likely that the State could show that the legislature would have had the power to enact the non-settlement provisions of HB 201 at the time of the 1978 redesignation legislation. It is clear from State v. Weiss, 706 P.2d at 683-84 that the legislature did not have the power to terminate this trust. However, HB 201 does not terminate the trust; it exchanges some substitute land for trust land and "sells" some land for the benefit of the mental health program, and it applies the setoff for money spent on the mental health program to the proceeds of the sale. The Alaska Supreme Court permitted the State to dispose of land from the university lands trust, as long as the university lands trust was compensated for the appraised value of the disposed land. State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981). However, that case involved the redesignation of 5,040 acres of university trust land of a total 100,000 acre trust for park designation. The difference between University of Alaska and this case was primarily one of degree. The court in Weiss stated:

> Unlike the situation in University of Alaska, the present case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the trust is intermingled with the general grant lands of the state. No particular use of the trust lands is specified and it may be years before much of the land is used. While it was reasonable to infer a legislative intent to pay for 5,040 acres for which there was a present park land use in University of Alaska, it is not reasonable to infer that the

> legislature meant to pay for a quantity of trust land approaching one million acres for which in large part there is no present use. Thus, the payment remedy imposed in University of Alaska is not appropriate here. Because the state in passing the redesignation act went beyond the power which had been granted it with respect to the trust lands by Congress, the redesignation act must be declared invalid.

State v. Weiss, 706 P.2d at 684. Under the Enabling Act, the State was given the power to exchange and sell trust lands for the benefit of the beneficiaries. Section 202(e) of the Enabling Act provides, in part:

> Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska.

The court concludes that the State would have greater difficulty establishing the second prong. Nevertheless there is a significant litigation risk associated with the non-settlement provisions of HB 201.

b. "Sold" lands

Under the Supreme Court's guidance in Weiss, the State must reimburse the trust for the fair market value of lands "sold" after the 1978 redesignation legislation. Weiss, 706 P.2d at 684. However, the State is allowed a setoff for "mental health expenditures" from the date of the redesignation legislation to the date of the "sale." Id. If expenditures exceed the fair market value of the lands sold, the State need not furnish cash as part of the reconstitution. Id. Thus, it is in the interests of the class to

exclude lands from the category of "sold" lands, and it is in the interest of the State to include lands within the "sold" category.

The Supreme Court expressly did not reach the issue which AMHA attempted to raise on appeal, viz. whether lands could be returned to the trust if the purchaser was not a bona fide purchaser. Weiss, 706 P.2d at 684 n.4.

There are several categories of land at risk of loss to the trust without compensation: pre-1978 disposals, land held by third party purchasers, municipality entitlements, classification to legislatively designated areas (LDA's), lands used by other state agencies, and lands exchanged with the Cook Inlet regional corporation ["CIRI"]. The leased coal lands at Healy and Beluga are not in these classes. If the case was litigated, those leased coal lands would clearly return to the trust.[68]

The court concludes that the litigation risk associated with the pre-redesignation legislation disposals is very high. Nothing in Weiss would require that they be included in the reconstituted trust. To mandate their return, the plaintiffs would have to prove a breach of trust or other invalidity other than the enactment of the redesignation legislation. It is not likely that the plaintiffs could do so, in light of the power of the legislature to sell the trust lands and the court's decision in University of Alaska.

These pre-1978 disposals encompass a significant amount of land and land value. Before the redesignation legislation, the State had disposed of 19,590 acres of original trust land in sales to individuals and 164,386 acres of original trust land to LDA's. Exh. 12, at 2b. The Chena Recreation Area outside Fairbanks was the recipient of much of the acreage lost to LDA's. The plaintiffs' estimate that as much as one-eighth of the value of the original trust lands, $237.5 million, is in the Chena Recreation Area.

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[68]The loss of these coal lands is significant. They are the only coal lands currently in production. They generate approximately $1 million per year in royalties.

The second category of land which may be lost is that sold to third party purchasers. It would be difficult for the plaintiffs to argue that the land was not "sold." The question would be whether the bona fide purchaser doctrine applied, and if so, whether the plaintiffs could obtain the land from purchasers because they were not bona fide purchasers. The plaintiffs' claim that the bona fide purchaser doctrine should be applied is a strong one. It is a doctrine normally applied to property purchased where the trustee breached the trust by selling trust property. See Restatement (Second) Trusts § 284 (1959). Weiss implies that basic trust principles should be applied to this trust. See State v. Weiss, 706 P.2d at 683 and n.3. However, the litigation risk associated with recovering this property is very high because most of the purchasers probably were bona fide purchasers. The trust would only recover the property if the purchaser bought the property with knowledge of the breach of trust.[69] It is likely that most purchasers before 1985 did not know that the State had breached its fiduciary obligations to the trust. Few people even knew there was a mental health lands trust before this litigation was filed in 1982. The third party purchasers may have other defenses as well such as the statute of limitations, waiver, and the lis pendens expungement before the appeal.

The value associated with land conveyed to third party purchasers is significant. Ms. Hayes stated that the plaintiffs valued these lands at $154.6 million. The chance of recovering any significant portion of those lands is low.

The third category which may be lost is land that was conveyed to municipalities as part of the municipal entitlement program.[70] Plaintiffs claim that this land was not really sold, it was

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[69]Sometimes property can be recovered from those who should have known of the breach of trust. See Restatement (Second) Trusts § 297 (1959). Plaintiffs have also asserted that if the sale was for less than fair market value, the trust should recover the land. This basis for recovery is more tenuous in light of the history of state sales at less than fair market values.

[70]Each municipality was allowed to select a specified number of acres of state land within its boundaries. See AS 29.65. Municipalities were permitted to select

given away with no expectation of payment. The State argues that it was sold just as the lands designated for Chugach State Park were sold in University of Alaska. Even if the plaintiffs prevail on whether the land was sold, they face a major obstacle in obtaining the lands since many of the lands have been sold by the municipalities to individuals, some of whom are likely to be bona fide purchasers.

The court assesses the litigation risk for the municipal conveyance as medium. The value was given by Ms. Hayes as $188.1 million.

The fourth category of land which may be lost is the LDA land, that is, land which has been set aside by the legislature for other uses such as parks. The plaintiffs claim that the land was not sold. The State asserts its right to designate the trust land as recognized in University of Alaska.

The litigation risk associated with these lands is high in light of University of Alaska. The mineral value of these lands determined by Dr. Metz was $534.9 million.[71] See Exh. V, at 23 (Table 3).

The fifth category of land which may be lost is the land used by other state agencies. The plaintiffs argue the land has not been sold. The State probably argues that the trust land is like condemned land.

The court assesses the litigation risk as high. The value of the land has been estimated at $15 million.

The sixth category of land which may be lost is the land which was exchanged with CIRI. This exchange was approved by

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mental health trust land until the October 4, 1985. AS 29.65.060. On October 4, 1985 the Alaska Supreme Court issued the Weiss decision.

[71]This figure includes the Chena Recreation Area, discussed above. Excluding that area, the value is around $300 million.

legislation in the United States Congress. Accordingly, it could be appropriate to regard the land as taken away by Congress and thus lost. The plaintiffs argue that the trust should receive the land that was exchanged for this land.[72] The State may argue that Congress did not intend for the exchanged lands to be included in the trust since the conveyance did not specifically mention the mental health trust.

The court considers the litigation risk associated with the exchanged lands to be fairly low and the risk associated with return of the original lands to be extremely high. The plaintiffs have valued the CIRI lands at $45.5 million.

There are significant litigation risks associated with several categories of land. The amounts at risk, as estimated by the plaintiffs, is shown below.

Table 3
Litigation Risks

Land Category	Litigation Risk	Value (in millions)
Pre-1978 lands	Very high	$237.5+
Third party purchasers	Very high	154.6
Municipal conveyances	Medium	188.1
LDA's	High	300
State agencies	High	15
CIRI (exchanged lands)	Low	45.5
	Total	$940.7

c. Setoff

The setoff for state expenditures for the mental health program presents a very significant litigation risk. The setoff has

[72]Weiss provided that where exchanges are made, "the properties which can be traced to an exchange" will be included in the trust. Weiss, 706 P.2d at 684.

the potential to negate any cash recovery to the trust resulting from the State's obligation to pay for "sold" lands.

The plaintiffs disagree that the State should be able to apply a setoff in this way and assert that the Supreme Court's statement in Weiss was the result of mismanagement by then-class counsel.

The litigation risk associated with winning this claim at trial is very high. First, the Alaska Supreme Court has already stated that the setoff is to be applied. Second, it is very unlikely that the ruling would be reviewed by the United States Supreme Court. Third, there are sound arguments that favor the setoff. Section 202(e) of the Enabling Act appears to allow the proceeds of sales to be used for the necessary expenses of the mental health program.

If the setoff is applied, its impact would likely be substantial. The court has no evidence of the size of the setoff. The legislature found that "state mental health expenditures have totaled more than $1,300,000,000" since 1978. HB 201 § 1(18). Even if this sum is reduced because of overinclusion of expenses and overinclusion of years,[73] it has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been "sold."

d. Lost opportunity claim

Weiss and AMHA maintain that the plaintiffs' claim for lost opportunity damages due to the State's mismanagement of the trust would more than nullify the setoff for state expenditures. There has been no discovery done on this issue. There has been no attempt to litigate the issue. This claim has largely been relegated to an occasional whisper from the back of the courtroom; this claim

[73]The Supreme Court's guidance appears to limit the setoff to amounts spent from 1978 to the date of the "sales." That would limit expenditures to the period from 1978-85 for most "sold" lands.

has never played a central role in anyone's analysis of the case until the hearing on final approval.[74]

There are significant risks associated with the lost opportunity claim. The court believes that it is very likely that the plaintiffs could prove that the State mismanaged the trust. The State did not treat these lands differently from other state lands even before the redesignation legislation. DNR did not manage the lands proactively to produce income for the trust. The State did not even maintain separate accounting for trust revenues. The difficulties with the claim stem from the difficulty of proving damages and the potential for the assertion of legal defenses.

Lost opportunity damages are difficult to prove in the any case unless there is an existing history of business activity or earnings. They would be extremely difficult to prove in this case.

The most difficult area of proof concerns the mineral lands. Almost nothing is actually known about the mineral producing capacities of these lands. The lands were open for mineral development and staking for free from the time they were in state control until after the Supreme Court's decision in Weiss. Accordingly, the proof would center on what would have happened with proactive promotion of the lands. However, there is no appropriate comparative standard. Throughout this period no group in this state actively promoted mineral lands. Thus, it is hard to predict how the mineral industry would have reacted to active management. Even if the plaintiffs overcome this hurdle, they would have to prove how much money they would have earned from producing mines. Alaska has not had a very active

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[74]For example, the proponents of the Chapter 66 settlement agreement had only this to say about this claim in their informational booklet for the class:

> The Plaintiffs also argue that before taking the setoff the court should consider what the trust should have earned if it had been properly managed. Even if Plaintiffs were able to establish the principle, it would be very difficult to prove what should have been earned.

Preliminary Report on Proposed Settlement of the Mental Health Trust Lands Litigation (Chapter 66 SLA 1991), at 42 (1991).

metallic mineral industry, other than for the production of gold. There is a substantial risk that the plaintiffs would be left with speculative damages for which they could be awarded nothing.

The easiest area to prove, lost opportunity damages concerning the surface lands, still poses litigation risks. There are proof problems there as well. The years from 1966 (when selections were largely completed) to 1978 were growth years for the state, but most of the growth occurred in the latter part of that period with the building of the Transalaska pipeline. The plaintiffs could have difficulty showing a market for lands before 1975. The plaintiffs could also have difficulty from absorption rate[75] analysis.

The claims are also subject to legal defenses. The State could probably defeat some of these claims by the statute of limitations. The State could probably defeat most claims after 1986 based on waiver.[76] The State could also assert that any claims in excess of the setoff are barred by the lateness of the assertion of the claims and the limitations placed by the court on the intervention by AMHA.[77] The potential defenses put some if not all of the potential damages from the lost opportunity claim at risk.

e. Valuation issues

The bulk of the values given by the plaintiffs is derived from mineral lands. The $2.2 billion value for original trust lands derived from procedures approved by the Interim Mental Health Trust Commission contained a $1.5 billion component for

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[75]The absorption rate is the amount of time it takes the market to absorb a portfolio of property offered at one time.

[76]Around 1986 or 1987, the Interim Mental Health Trust Commission functioned as substitute trustee for the lands. Many of the transactions involving the lands were agreed to or not objected to by plaintiffs. Since 1990, at the plaintiffs urging, there has been a preliminary injunction precluding the State from taking or permitting any activity on the original trust lands without court approval.

[77]The lost opportunity claims were not asserted in the original complaint in this case. They were added in 1986 when AMHA filed its complaint in intervention. The court limited AMHA to issues affecting the reconstitution of the trust. An independent claim for damages may exceed that limitation.

mineralized lands. The $1.9 billion value attributed to the original trust lands under the Chapter 66 process contained a $1.3 billion component for mineralized lands. The $1.0 billion value by plaintiffs for the original lands not returned to the trust under this settlement contains a $535 million value for mineralized lands. In litigation, the plaintiffs would have to prove the value of lands deemed "sold" to be able to recover any damages. There are very significant litigation risks associated with proving the numbers stated. In fact, after extensive evidence on the issue at the final approval hearing, the court believes that the plaintiffs' valuations significantly overstate the value of the mineralized lands.

The plaintiffs' values for the mineralized land derive from valuations reached by Dr. Paul Metz in reports completed in 1988 and 1994. The two valuations are based on the same methodology and assumptions. In the 1994 report, Dr. Metz performed additional work by forming mining models to demonstrate economic viability of his posited mineral deposits and he changed the purchase price of the ore in conformity with historical market prices.

It is necessary to conduct extensive drilling on site to know whether land actually contains economically minable mineral deposits. Even with such drilling, the risks associated with metallic mineral development are such that mines developed with billion dollar investments turn out not to be profitable and are abandoned.

There is virtually no actual drilling information on the original mental health lands. As a result, Dr. Metz performed a probabalistic estimate of expected value.[78] Dr. Metz relied on a report prepared by the Alaska Division of Geological and Geophysical Survey ["ADGGS"] regarding original trust lands. ADGGS examined the known literature about the area of mental health trust lands by 1:250,000 scale quadrangle. They rated areas on a scale of one to five for low to high potential for the existence

[78]This methodology is an accepted method to derive the expected value of unknown and unexplored reserves.

of a mineral deposit. They identified 21 mineral deposit models expected to occur in the trust lands.

Dr. Metz also relied on the United States Geological Survey ["USGS"] appraisal of Alaska mineral resources prepared for consideration of the Alaska National Interest Lands Conservation Act. These "Open-File Reports" also involved several USGS experts reviewing the literature and estimating the number of mineral occurrences in the area at the 10th, 50th and 90th percentile levels of confidence.

Dr. Metz developed geological models based on the models of Cox and Singer[79] to replace the ADGGS models. In doing so he chose the 90th percentile tonnage and 90th percentile grade from the tonnage and grade curves provided by Cox and Singer.

None of this information allows one to predict the probability of occurrence. To develop probabilities Dr. Metz relied on three more studies: Charles River Associates, Koulomzine and Dagenais, and Bailey. From this information he assigned probabilities of discovery that on a per acre basis range from one acre in one million acres (1 in $1x10^6$) to one in 30 million acres (1 in $3x10^5$).

In the 1988 report, Dr. Metz developed his estimates of the net present value of an expected royalty stream from those calculations. He used a 4% net smelter return royalty[80] ["4% NSR"]. He assumed a 10% discount rate. He made several assumptions, including that the expected mine life for all models was twenty years, that the beneficial products in the ore would almost cover all smelting costs, and that the value should be

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[79]Cox and Singer are the authors of Mineral Deposit Models, a USGS Survey Bulletin.

[80]Current state leases call for a 3% net proceeds income royalty rate which is smaller than a 4% NSR.

calculated as if the mines were producing today, i.e., no delay for discovery, exploration or start-up.

The court heard several attacks on Dr. Metz's methodology and assumptions at the final approval hearing. The State presented testimony from Samuel Smith, the chief of the mine permitting section of DNR. H.L. presented testimony from three experts working with the firm of Behre Dohlbear & Company, Inc., mineral industry consultants located in Denver: Bernard Guarnera, the president and chief operating officer, Thomas Houseman, a financial expert, and Robert Cameron, a geostatistician.

Mr. Smith analyzed Dr. Metz' 1988 report. He took issue with several aspects of the report. Mr. Smith criticized the report on five points: the NSR values, the tonnage ore reserve, the mine life and commodity prices, and the time to discover and develop a mine. Correcting for the first four areas of disagreement reduced Dr. Metz' 1988 value for the mineral lands not being returned to trust status from $622 million to $129.5 million.[81] Applying a five-year delay in receiving revenues and a 10% discount rate reduces the value to $80 - $90 million.

Mr. Guarnera testified that Behre Dohlbear identified four basic problems with Dr. Metz' 1994 report: (1) stacking of deposits,[82] (2) disregard of costs for smelting, refining, and treatment,[83] (3) disregard of the necessary development time once a

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[81]Dr. Metz' 1994 value for mineralized NRTL's is $535.4 million.

[82]Where there was a possibility a parcel could contain more than one mineral deposit model, Dr. Metz added each one to obtain the expected value of the parcel. Behre Dohlbear opined that some of the deposits could not appear together for geological reasons; Dr. Metz disagreed. Behre Dohlbear also recommended using only the most likely model or assigning a pro rata value.

[83]Dr. Metz used 1% of the gross revenue as the smelting costs despite wide variability in such costs based on the type of ore. Dr. Metz defended his actions by relying on an assumption that the non-accounted-for minerals produced would pay for the increased smelting charges.

deposit is found,[84] and (4) the use of an improper discount rate. According to Mr. Guarnera, the mineral value of the original mental health lands would be reduced from $1.3 billion to $522 million if the stacking problem were corrected; that number would be reduced to $441 million if the proper smelting charges were used; that number would be reduced to $170 million if a 10-year development time was used. Applying the correction for stacking to the NRTL's yields a revised value of $245 million; that number is reduced to $94 million if a 10-year development time is used.

Mr. Guarnera opined that Dr. Metz' values were unrealistic. The models posited by Dr. Metz would yield more zinc, lead and silver on these one million acres than is produced in the entire United States.[85] The valuation, if true, would require $4.4 billion of annual metallic mineral production from these lands. The entire United States has $11 billion in annual metallic mineral production. There was $277 million in metallic mineral production in all of Alaska in 1989. If the predictions of the report were realized, 17 world class deposits would be located and mined on these lands.[86]

Thomas Houseman testified that Dr. Metz' use of a 10% discount rate is unrealistic based on industry experience with hurdle rates. He testified that a 10% discount rate would not be used even at a final feasibility stage after extensive drilling and exploration work. He stated that applying a 20% discount rate to the $1.3 billion value for original trust lands without any other adjustments would decrease the value to $738 million. If a 10-year

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[84]Behre Dohlbear pointed out that mines are made not found. They recommended a 10-year development time as realistic.

[85]The projections would yield three times current United States zinc production, 1.5 times current lead production, and 1.3 times current silver production.

[86]Dr. Metz defends his analysis by pointing out that our knowledge of plate tectonics would predict very large concentrations of metallic minerals in Alaska. He also points to the known world class deposits in Alaska associated with the Red Dog mine, the Alaska Juneau gold mine, the Quartz Hill molybdenum deposit, the placer gold deposits in Fairbanks and Nome, and the Kennicott copper mine near McCarthy.

development period was added, the value would be further reduced to $119 million. He opined that "expected value" is not real value and reliance on expected value can lead to unrealistic expectations.

Robert Cameron criticized two aspects of Dr. Metz' methodology. First, he disagreed with Dr. Metz' assessment and assumption that the Charles River Associates study presents expectations for the discovery of world class deposits. According to Mr. Cameron the study's expectations are of mineral occurrence of no size, quality or quantity. The expected value list used by Dr. Metz is roughly equivalent to grade/tonnage of the 50% percentile, not the 90th percentile. However, Dr. Metz used the data to predict deposits in the upper 10% of both grade and tonnage. Second, Mr. Cameron opined that Dr. Metz' stacking of mineral deposits increased the possibility of any one of the mineral occurrences occurring on a particular parcel. The net result of these errors is to overstate the probability that the posited mineral deposit will be found on trust lands.

These criticisms of the valuation of mineralized lands made sense to the court. There is very high litigation risk associated with proving a value for the mineralized lands deemed "sold" anywhere close to that contained in the report. The court concludes that the mineral values derived by Dr. Metz overstate the true value of the mineral lands. The risk is that trial would result in a finding of gross overstatement.

The unreliability of the valuation when compared to real value is an important consideration in evaluating this settlement in another respect as well. Some class members have been outraged that the trust is not being made whole, which they define as $2.2 or $1.9 billion of value. The court is confident that those are not real or reliable numbers. It is unlikely that the original trust lands could ever produce revenues approaching those that have been predicted. More importantly, given the lack of real knowledge about the lands that exists today, the number does not represent the fair market value of the lands. The valuations given by Dr. Metz are useful when comparing two groups of mineralized land, but they

do not compare with real money or with more reliable estimates of value.

3. Comparison of the likely results of litigation with settlement.

One approach for comparing the likely results of litigation with the settlement is to look at comparisons of value for the most likely results from litigation with the settlement. It is essential in making this comparison that the same assumptions for value are used throughout, accordingly, the court will use plaintiffs' values derived under Chapter 66 procedures. The value of the original trust lands under these assumptions is $1.9 billion; the value of the reconstituted trust lands is $1.1 billion.

If the case went to trial, it is not likely that all lands would be returned to the trust. The probable results range from a low value where the plaintiffs only succeeded in returning the municipal conveyances and the CIRI exchange lands and unencumbered lands to an optimistic value where plaintiffs were highly successful and lost only the pre-1978 land conveyances and 80% of the third party purchases. The low value of the reconstituted trust lands would be:

MRTL's (returned original lands)	$929 million (see Exh. AA)
Plus: CIRI exchange	45.5
Municipal conveyances	188.1
	$1,162.6 million

The high value of the reconstituted trust lands would be:

Total original trust lands	$1,900 million
Minus: Pre-1978 conveyances	237.5
80% Third party purchasers	123.7
Total	$1,538.8 million

It is the court's judgment that it is not likely that the trust would receive any cash component at litigation because the permitted setoff for state expenditures would exceed the value of

"sold" lands, even when tempered by plaintiffs' lost opportunity claim. Accordingly, plaintiffs' entire benefit from litigation would be a reconstituted trust worth between $1.2 billion and $1.5 billion. There would be no Trust Authority, no program improvements, and no budget advantages.

The settlement would yield $1.1 billion in reconstituted lands, $200 million in cash, the Trust Authority, program improvements, and budget advantages. When viewed in this light the settlement appears fair, adequate, and reasonable.

Another approach to comparing the results of the litigation with the settlement is to compare the value of the non-returned trust lands (NRTL's) with the substitute lands, the cash, and the other benefits. This approach deletes the original trust lands that are being returned from both sides of the equation. The parties' values for the NRTL's is given in Table 1 at page 62 and for the substitute lands in Table 2 at page 64. The following chart illustrates the difference in value between the NRTL's and the substitute lands ["PSL's"]:

Table 4
Difference NRTL's - PSL's

	State Values (in millions)	Plaintiffs Values (in millions)
Surface	$342.4	$342.4
Minerals	<60>	374.4
Timber	1.7	10.5
Coal	38.6	28.9
Hydrocarbon	0	0
Total	$322.7 million	$756.2 million

According to believable testimony at the final approval hearing, the $200 million in cash is the equivalent of the $340+ million in lost surface value when considering a ten-year absorption rate for the property, a 5% appreciation rate, and a 16% discount

rate. Thus, the difference between the non-returned trust lands and the settlement is primarily the loss of the Healy and Beluga leased coal lands and an uncertain amount of mineral value. The court considers this to be a reasonable and adequate trade considering the uncertainty and likely overstatement of the mineral valuation, the importance of the litigation risks, the value of the Trust Authority and program improvements, and the budget advantages from the settlement.[87]

A third approach to comparing the results of litigation with the settlement is to compare the two if the non-settlement provisions of HB 201 are valid. In this situation the comparison is clear: the class is better off with the settlement. If the non-settlement provisions of HB 201 are valid, the result of further litigation is certain. The trust would be reconstituted with exactly the same lands as those in the settlement. The trust would be managed by DNR. The class would not receive the other benefits of the settlement: $200 million, the Trust Authority, the program improvements and the budget advantages.

In summary, regardless of the approach used, the court concludes that when comparing the likely result of litigation with the settlement, the settlement is fair, adequate and reasonable.

Settlement is usually preferable to lengthy and expensive litigation with uncertain results. Newberg on Class Actions, § 11.50, at 11-122. Although liability of the State has been established in this case, much uncertainty remains with regard to the amount and type of relief. Land valuation has been a major point of disagreement between the parties since settlement discussions began. An additional parade of experts testifying about the mineral values and other land resource values will add more to

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[87]The court has difficulty calling the exclusion of the Healy and Beluga leased coal lands "fair." There was no legal impediment to their return. If the legislature reclassified them outside the settlement it would probably constitute a breach of trust. Approval of this settlement would have been a more satisfying result if those lands had been included in the reconstituted trust.

the cost of litigation than to the useful information on which to base the reconstitution of the trust.

The outcome of litigation of third party titles is far from certain. Such litigation is likely to involve the complication of defendant classes composed of the holders of third party titles. This would add greatly to the expense, duration, and complexity of this litigation and directly involve a large number of holders of small parcels. At the same time there would be little or no benefit for the class, when compared to the present settlement proposal, because of the setoff for the State's past mental health expenditures.

The court concludes that the added cost in time and money of further litigation in this case cannot be justified by the probable outcome of litigation. The plaintiffs suffer from delay because they are prevented from benefitting from the program improvements and the trust lands lie idle. There is benefit to putting this litigation to rest with a reasonable, though not ideal, settlement.

E. Reaction of the Class to the Settlement

Generally, if some class members or their counsel raise cogent objections, a court must be concerned that the case may have been settled with too little regard for the interests of the class as a whole. MCL 2d § 30.41, at 237. Substantial objections to a proposed settlement require a detailed response from the proponents. MCL 2d § 30.42, at 238. At the same time, a lack of objections or comments from the class is not always an indication of fairness. In complex cases such as this one, "when the majority of absent class members are usually unrepresented by counsel and possess insufficient knowledge to evaluate the fairness of the settlement," a court should not make an inference of fairness based on silence or a low number of objections from class members. Newberg on Class Actions § 11.48, at 11-117. A court always has a responsibility to analyze the settlement independently and intelligently and comments from the class are one factor in that analysis. Id. In addition, this court has a greater responsibility here than in most cases, due to the unsophisticated nature of most class

members. Although relatively few class members commented on the settlement, the court does not presume that all of those not commenting support the settlement. In fact, it is reasonable to assume that the same ratio of supporters and objectors exists among the silent class members and families as exists among those who submitted comments to the court.

Comments from a (b)(2) class are intended to alert the court to problems in the settlement such as potential conflicts between portions of the class. Comments from a class such as this one should not be treated as votes, although tabulation of the number of class members expressing particular opinions can be useful to the court in recognizing trends in evaluation of the settlement by class members.

Often the opinions of the named representatives of the class are of particular value to a court because the named representatives usually have a greater involvement in the case than other class members. In this particular case, the families of class members and other class advocates appear to have been at least as involved as the named representatives. One family member, Vern Weiss, is named in this case because his son, Carl Weiss, was a minor when he was named one of the original representative of the class. Mr. Weiss strongly opposes the settlement.[88] Final Hearing (Nov. 2, 1994). John Malone, a family member who has been closely involved with this case for several years supports the settlement, primarily because he believes the Trust Authority could be an effective advocate for beneficiaries. Final Hearing (Nov. 2, 1994). Other named representatives typically aligned with the viewpoint of the attorney who represents them.

1. Written comments

A post office box was rented by the court for the receipt of class comments. Individuals from the Department of Law in

[88]Earl Hilliker, another original named class member, sent a written comment opposing the settlement, but his oral comments left the court uncertain about his opinion of the settlement. Final Hearing (Nov. 2, 1994).

Fairbanks monitored the box and stamped each comment with the date received. Each comment was given a sequential number and copies were sent to class counsel at least once per week. The original comments were transferred daily to the court.

Approximately eleven hundred (1,088) written comments were received from a variety of locations in Alaska, including Barrow, Homer, Ketchikan, Anchorage, Fairbanks, and Juneau. Nearly four hundred comments were from class members, family members of class members, beneficiary advocacy groups, or guardians of class members.[89] Over 150 of these were from class members. Approximately 80 were received from mental health advocacy groups[90] or people indicating they work in the mental health field.

Because many members of the class may not be able to understand the notice or speak for themselves, comments from family members, guardians, advocacy groups, mental health professionals, and others working directly with trust beneficiaries were all considered together as comments from the class. Therefore, approximately forty percent of all written comments received were considered class comments.

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[89]The court included among beneficiaries/class members the few commentators who described themselves as suffering from a mental illness or chronic alcoholism even though on the form they marked the box for "member of the public." A similar approach was taken for all other categories of commentators because some clearly did not understand the categories.

[90]Organizations, boards, and commissions which submitted written comments in favor of settlement approval included the Alaska Addiction Rehabilitation Services (named party), Alaska Alliance for the Mentally Ill, Alaska Mental Health Board, the Governor's Council for the Handicapped and Gifted, the Juneau Alliance for the Mentally Ill, the Ketchikan Alliance for the Mentally Ill, and the Older Alaskans Commission. The Alzheimer's Association recommended approval, but had several specific reservations about the settlement. The organizations submitting written comments in opposition to the settlement included the Alaska Mental Health Association (named party), the Anchorage Alliance for the Mentally Ill, the Fairbanks Alliance for the Mentally Ill, the Kenai Alliance for the Mentally Ill, and the Mental Health Consumers of Alaska.

A total of 47 purchasers of original trust land sent comments to the court. A few purchasers of trust land marked "beneficiary" on the comment form, but were clearly concerned exclusively with obtaining clear title or monetary compensation for problems caused by their clouded title.[91] The interests of purchasers of original trust land are directly adverse to those of the class and, therefore, were excluded from comments categorized as class comments.[92]

Comments from the general public who indicated no connection with the mental health community also were not categorized as comments from the class.[93]

The court read every comment received by October 21, 1994, including those from the general public and purchasers of trust land. However, the court's consideration of the comments was weighted according to whether or not it was categorized as a class comment.

Counsel for H.L. urged separate consideration of comments from the general public, arguing that the court should consider the "public interest" and the fairness of the settlement to all persons affected by it. Proponents' Memorandum Re: Class Comments, at 5-6 (Nov. 14, 1994). Notice was certainly broad

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[91]These purchasers appeared to mistakenly consider themselves "beneficiaries" of the trust or the settlement because they had purchased trust land.

[92]Naturally, virtually all purchasers of trust land favor approval of the settlement in order to clear title to their land. If this case went to trial, such purchasers would be defendants in this case. It would be inappropriate for the court to give the comments of purchasers the same weight as the class comments.

[93]The court rejects the State's suggestion that every resident of Alaska is a class member. Carried to an extreme, the same could be said of all United States residents, because they might move to Alaska and later require mental health services. While it is true that any person theoretically could need mental health services in the future, most Alaska residents do not have sufficient experience with mental health services to enable them to comment as class members or their representatives. Moreover, unless people perceive themselves as potential beneficiaries, it is unlikely that they would identify with the beneficiaries' interest in the settlement.

enough to give all persons who might be affected by this settlement, including purchasers of original trust land, an opportunity to bring their concerns to the court's attention. However, comments from individual members of the public are not necessarily the same as the "public interest." In the present case, the public comments were a diverse and often conflicting mixture of concerns including enforcement of the trust, society's responsibility to care for the mentally ill and retarded, the cloud on state and private land titles, economic development, and moving public money and energy to other issues. Although this settlement must be consistent with the Enabling Act, the court concludes that the "public interest" is not an independent factor for analysis. The court must give full consideration to the views of class members and their representatives in light of the court's fiduciary duty to act as guardian of the interests of the class. Welsch v. Gardebring, 667 F. Supp. 1284, 1295 (D. Minn. 1987). Therefore, the court gave little weight to public comments as compared to the weight given to class comments.

Mr. Gottstein and Mr. Walker expressed concern that some people submitting written comments might falsely claim to be beneficiaries or to have family members who were beneficiaries. Motion in Limine Re: Public and Class Comment, at 7-8 (Oct. 12, 1994). The court believes there are few people who would claim to be mentally ill or to have a mentally ill family member unless the claim was true. A review of written comments shows there is a greater likelihood for some class members to have indicated they were members of the public, not realizing or not wanting to admit they qualified as members of the class.[94] In addition, at the final hearing the court observed that the overall ratio of class comments

[94]Indeed, among the forms counted as class comments by the court were those marked "member of the public" where the commentators described themselves as suffering from a mental illness or discussed a family member who was mentally retarded or mentally ill.

for and against the settlement was approximately the same as the ratio for written class comments.[95]

Mr. Gottstein and Mr. Walker requested that class membership or representation of a class member be verified prior to acceptance of a comment as one from the class. Motion in Limine Re: Public and Class Comment, at 7-8 (Oct. 12, 1994). The court has rejected this suggestion. Verification would be impossible in some instances and would raise privacy issues.

The court finds the concerns about an overinclusive method of notice to be misplaced.[96] Comments were sought from this class to obtain a sense of how class members or their representatives viewed the proposed settlement. Contrary to the misconceptions of Mr. Gottstein, Mr. Walker, and a few individuals who submitted comment forms, the court does not view the comments as a vote which would determine the court's decision. The reaction of the class to the settlement proposal is only one of several factors the court must consider in its decision regarding whether to grant final approval.[97]

The reasons behind the class comments were at least as important to the court as the actual tally of class comments "for" or "against" the settlement. A democratic vote by informed class members with a full understanding of the issues bearing on the

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[95]The court believes it extremely unlikely that anyone would appear in person before the court and falsely claim to be a class member or to have a close connection to the class. One mother of a beneficiary spoke convincingly of the courage required of her to speak publicly of her child's problems because of the stigma society continues to attach to mental illness. Final Hearing (Nov. 1-2, 1994).

[96]Ironically, the more common problem with notice in class actions is insufficient notice that excludes many class members. If notice in this case had been sent only to current recipients of state mental health services, as Mr. Gottstein and Mr. Walker urged, all past and future beneficiaries who were not current recipients would have been excluded. Also excluded would be class members for whom the state does not currently offer services. The number of class members fitting into this latter category could be fairly large.

[97]The reaction of the general public is not a factor.

settlement in any large and complex class action would be impossible. In re Agent Orange, 597 F. Supp. at 760-61. A court has the authority to approve a settlement even when a significant percentage of the class or named plaintiffs oppose it, as long as the court determines the settlement to be fair, reasonable and adequate and in the best interests of the class. See, e.g., Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1421-22 (D. Minn. 1987); see also Armstrong v. Board of School Directors, 616 F.2d 305, 326 (7th Cir. 1980) (opposition is relevant but "not dispositive even when many class members object"). This is particularly likely where a case is long and complex and most class comments reflect a lack of understanding of the legal issues underlying the lawsuit or the risks and uncertainties inherent in a trial. See Armstrong, 616 F.2d at 326; In re Agent Orange, 597 F.Supp. at 759.

2. Results of written comments

Overall, written comments from the class were approximately two to one (2:1) in favor of approval for the settlement. Approximately three hundred beneficiaries, family members, guardians, advocacy groups, and mental health workers said the court should "approve" the HB 201 settlement. Almost one hundred and fifty beneficiaries, family members, guardians, advocacy groups, and mental health workers urged the court to "reject" the settlement.[98]

Despite the publicity this case has received during the past several years, the comments reflected much confusion and many misconceptions regarding this case, class actions generally, and

[98]The court may approve or reject a class settlement, but has no authority to amend it. Manual for Complex Litigation, Second § 30.41, at 237. When the person commenting placed conditions on acceptance that were not part of the settlement or stated that the settlement should be accepted only if amended, the court considered the comment to be recommending rejection. At the same time, the court recognizes that some of these people might not have chosen rejection if they had thought rejection would lead to trial rather than to a new settlement.

settlement of class actions in particular. The written comments indicated that few people obtained information beyond the notice.

Many people commenting appeared to believe that the trust and beneficiaries would receive nothing if the settlement is not approved. Many commented that the settlement should be approved simply because society has an obligation to help the mentally ill and retarded.

Several class members or their families provided no reason for their recommendation of approval or rejection. This made it impossible for the court to determine whether they had at least a rudimentary understanding of the case and settlement.[99] A few class comments did not directly recommend either approval or rejection of the settlement and showed enough confusion about the case and settlement that the court was forced to count the comment as "unknown." For the purposes of an overall tabulation of class opinion, however, class members who marked a box for acceptance or rejection while not providing a reason were assumed to have the same degree of understanding as the majority of the class or their representatives. The court views the "approve" and "reject" tabulations as merely indicative of the general trend of class opinion. Of greater interest to the court are the reasons given for approval or rejection.

Many commentators volunteered the opinion that mental health services in Alaska are presently inadequate, and some describe long waiting lists or the complete lack of a particular service. Some of these people urged the court to approve the settlement so that mental health services could be expanded. Others who described inadequate services believed the legislature would use the existence of the trust fund as an excuse to cut appropriations from the general fund for mental health, particularly

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[99]Mr. Jessee's October 24, 1994, affidavit was helpful with regard to eight comments from mentally retarded class members residing at Hope Cottages. The affidavit shows the difficulties in evaluating comments from a class containing members who are mentally challenged.

as oil revenues decline.[100] Still others urged settlement approval because they believed the legislature had expressed frustration with the lack of a settlement by cutting funding for mental health services.

Class comments opposing settlement had concerns that included: (1) DNR would manage the trust lands; (2) the value of the lands in the reconstituted trust was much lower than the value of original trust lands; (3) the active Usibelli coal leases were not included in the reconstituted trust; (4) a legislature in the future could make changes adverse to trust beneficiaries; and (5) there was no guarantee of adequate funding for even the current level of state mental health services.

One of the biggest concerns of those opposing the settlement was DNR management of trust lands. A few seemed incensed that the same agency which breached the trust in the beginning would continue to manage trust lands under the settlement. Some believed DNR was simply incompetent and incapable of maintaining accurate records of trust lands. People concerned about DNR management preferred an agency outside of the existing structure of state government to manage the land. A few indicated that the Trust Authority alone should have control over all of the trust assets.

Another major concern expressed in class comments opposed to the settlement was the inadequacy of the total compensation to the trust. Some were disturbed that the total

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[100]Several commentators viewed the recent reduction in beds at the Alaska Psychiatric Institute as an example of the legislature's inclination to reduce the present level of mental health services. The Commissioner for the Department of Health and Social Services, however, indicated the reduction in services at API was based on a professional decision. Final Hearing, testimony by Commissioner Lowe (Oct. 25, 1994). Commissioner Lowe stated that no one who met the criteria for admission had been denied admission to API. Id. The modern trend for such hospitals is to provide tertiary care for very serious complex cases of mental illness and shorter crisis-oriented care. Id. On the other hand, the Commissioner admitted that the change in policy for API was occurring more rapidly than initially planned due to budget cuts. Id.

number of acres in the reconstituted trust was less than the original one million acre grant. Several thought the trust should receive both the surface and subsurface estate for all trust lands. The belief that the land being returned to the trust was not as valuable or productive as the land lost to the trust was frequently expressed, often with the opinion that the Usibelli leases should be included in the reconstituted trust. Several people concerned about land values stated that the State should at least pay fair market value for unreturned land and they did not believe the settlement was adequate in this respect. A few thought the State should pay for all surveys of trust lands and encumbrances. There was an underlying sentiment that the State was not being sufficiently penalized for breaching the trust.

Other common concerns involved the legislature and funding. Several class comments expressed fear that the legislature would make adverse changes in the future or even repeat the redesignation action that precipitated this case. These people longed for assurances that this would not happen. Many of those opposed to the settlement believed that the legislature would use the existence of the trust as an excuse to cut mental health funding from the general fund. Some of these people felt they were getting little from the settlement because most mental health services would remain dependent on appropriations from the general fund.

Class comments in favor of approval for the settlement provided reasons such as (1) more energy should be spent on the provision of services rather than on litigation; (2) the HB 201 settlement was the best the class could get and further litigation would not produce better results for the class; (3) the case had lasted long enough and the time had come to settle; and (4) the combination of land, cash, and the Trust Authority was adequate as a settlement, and more litigation would not be likely to bring a better result.

Many class comments favoring approval simply stated it was time to end the case and move on to providing services for the beneficiaries. They believe money should be diverted from

litigation to services for beneficiaries. One class member said he needed unavailable services now and could not wait any longer. Another person wrote a detailed description of the lack of services in bush villages and urged approval of the settlement so that more services could be provided.

Several commentators liked the idea of a cash fund managed by the Alaska Permanent Fund Corporation. A few found no problem in DNR management as long as the Trust Authority had oversight. Several thought that having the Trust Authority determine how trust income is spent would eliminate some of the politics from mental health budgeting. These people and others believed that mental health funding needed to be more stable; some added that beneficiaries needed to be able to depend on the continuing availability of services. They believed the Trust Authority could provide this stability.

3. Class comments at the final hearing

The court allowed an opportunity for oral comments from class members, families and organizations in an Anchorage courtroom all court-day on October 24, at the Alaska Psychiatric Institute in the evening of October 25, and in a Fairbanks courtroom from 2:45 p.m. to 6:00 p.m. on November 1 and 2. A total of 79 people commented during the hearing, 35 in Anchorage and 44 in Fairbanks. Because the overall number of people wishing to make comments during the final hearing was small, the court permitted a few members of the public to speak. As with the written comments, the court considered only the 67 comments from people connected to the class to be class comments relevant to the issue of whether to grant final approval of the settlement. The court has entered a single tabulation for those who commented orally and in writing.

Overall, nineteen class comments in Anchorage favored approval, eleven favored rejection, and two could not be determined. In Fairbanks, twenty class comments favored approval, thirteen favored rejection, and two could not be

determined. The majority of class comments came from close family members of beneficiaries and representatives of organizations rather than from beneficiaries themselves.[101]

People who favored approval of the settlement were often more resigned than enthusiastic. Some commented that attention should switch from litigation to the provision of services. A few were concerned that money spent on litigation was taking money away from mental health programs. They believed that settlement would bring more funding for programs benefiting beneficiaries. Overall, class comments in favor of approval reflected a feeling that the case had lasted long enough and that this settlement was adequate or at least the best result the class could get.

The Trust Authority was viewed as a major benefit of the settlement. In this regard, one family member pointed out that by having DNR manage the land and the Permanent Fund Corporation manage the monetary corpus, the Trust Authority could concentrate more on programs and services of direct benefit to the beneficiaries. It was hoped that the Trust Authority would be an effective advocate for mental health program funding when the mental health budget comes before the legislature each year.

One of the greatest concerns of those commenting against approval of the settlement was DNR management of trust lands. There was strong opposition to placing the agency which is viewed as having mismanaged trust lands in the past in charge of the reconstituted trust lands. The fact that the trust lands would be managed by a separate unit seemed not to have significantly decreased the distrust of DNR.

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[101] Among the organizations represented at the hearing were Advocacy Services, Alaska Addiction Rehabilitation Services (Nugen's Ranch), Alaska Alliance for the Mentally Ill, Alaska Crippled Children's Association, Alzheimer's Association, Anchorage Alliance for the Mentally Ill, Fairbanks Alliance for the Mentally Ill, Fairbanks Resource Agency (provider of services for developmentally disabled and Alzheimer's patients), Governor's Council for the Handicapped, Independent Living Council (Access Alaska), and Project Teach (services for developmentally disabled).

Some of the objectors believe the class will not benefit from this settlement. They are convinced that the legislature will not adequately fund mental health programs from the general fund so that income from the trust will be used entirely to continue funding current services rather than to provide new or expanded services. They point out that income from the initial $200 million will not come close to meeting the annual $130 million budget for state services for beneficiaries. As a result, they feel the class has nothing to lose by continuing with litigation. In answer to the court's question regarding their choice between the HB 201 settlement or trial, all but one of the objectors preferred trial.[102]

Some people who spoke against the settlement obviously feel terribly wronged by the State's breach of the trust. They view the State as untrustworthy and perceive a continued reluctance on the part of the State to care about the needs of the beneficiaries. Many view the non-settlement provisions of HB 201 as an unfair threat by the legislature. Many felt that the legislature could not be trusted in the future. More than one person spoke of seeking justice. There seemed to be a sense of outrage underlying the comments of those opposing the settlement.

4. Conclusion

The court has carefully read and considered every written class comment. During the final approval hearing in Anchorage and Fairbanks, the court carefully listened to every comment and has considered each one. The time expended by family members, beneficiaries, and their advocates to bring their concerns about the settlement to the attention of the court was sincerely appreciated. The court recognizes that speaking in person to a judge, particularly in a formal courtroom, was not an easy task for many people.

Those on either side of this emotional issue will undoubtedly feel betrayed if this court's decision is opposite their

[102]Few of the objectors choosing trial exhibited a full appreciation of the complex legal issues facing the litigants at a trial of this case or of the risks and costs inherent in any complex litigation.

own opinion. Those favoring the settlement believe the result for the class could be worse if this settlement is not accepted. They are convinced that the settlement is adequate at present and that further litigation will bring nothing better. Those opposing the settlement see no benefit for the class in the HB 201 settlement. They believe the class has nothing to lose by continuing the litigation to trial. The court notes that even with a two to one ratio in favor of the settlement, the objections among the class are not far from insignificant.

Two people who commented at the session held at API aptly illustrated the division among the class in this case. One woman, whose family member is a beneficiary and who had followed the case closely for the past six years, spoke in favor of the settlement. She talked about the importance of the Trust Authority and the program improvements. She opined that another settlement was not likely to be better than this one. She acknowledged that this settlement "won't answer the prayers of the beneficiaries and their families." A man who also had a family member who is a beneficiary spoke later against the settlement. He talked about the need to reinstate the trust and to assure that the trust is protected in the future. He too acknowledged that this settlement would not answer the prayers of the beneficiaries and their families, but he believed it was essential to fight on until they achieved something that would. On the whole, the class sees that there are problems with this settlement. Some would choose to accept the agreement as the best that can be achieved and turn their energies to the future. Others would choose to reject this settlement and any other unless the settlement was what all desire, assurances of a comprehensive mental health program which is fully funded and a trust which is guaranteed to pay the full costs of such a program.

The class comments were helpful in defining the differences between those who favor the settlement and those who oppose it. The court was touched by the sincerity of all who chose to write or speak and by the depth of their concerns. The class comments did not raise any new issues which had not been

presented by counsel, but they gave breath to the statistics and life to the many whose lives will be affected by this litigation. The court serves a fiduciary role in analyzing this proposed settlement. The class comments highlighted for the court the hopes and fears of the class and their families. The court has kept those images paramount when analyzing the complex facts and calculations which go into this decision.

The court agrees that there are problems and risks associated with this settlement. An ideal settlement would have included the leased coal lands in the Healy and Beluga fields,[103] provided for total responsibility and control of trust assets by a trustworthy fiduciary with total awareness of trust responsibilities, and would have assured the beneficiaries that necessary services would have guaranteed funding. This settlement is not ideal. It may not even be the best settlement that has been offered to the plaintiffs. However, the limited role of the court mandates that the court not compare the settlement with an ideal one. The task is to decide whether this settlement is "fair, adequate, and reasonable."

Considering all these factors, the court concludes that when viewed with other factors considered for final approval, the class opposition to the HB 201 settlement is not of a type or amount to preclude final approval of the settlement.

F. Experience and Views of Counsel

The four attorneys for the class have disagreed about both of the two most recent proposed settlements, Chapter 66 and HB 201. Those objecting to the previous Chapter 66 settlement urge approval of the present HB 201 settlement; those who urged approval of the Chapter 66 settlement now object to the HB 201 settlement.

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[103]The only reason to exclude these lands was the political power of the coal industry. Complete justice would have demanded their return to the trust.

Newberg on Class Actions suggests that the weight accorded to the recommendation of counsel is dependent on factors such as (1) length of involvement in the litigation, (2) competence and experience in the particular type of litigation, and (3) the amount of discovery completed. Newberg on Class Actions § 11.47, at 11-112. In this case, Mr. Walker and Mr. Gottstein, who object to the settlement, have the longest involvement in the case. However, one or two fewer years involvement by Mr. Jessee, counsel for the developmentally disabled, and Mr. Volland, counsel for chronic alcoholics, is insignificant in the context of a twelve-year lawsuit. Mr. Gottstein has more experience with land issues, but Mr. Volland has more experience with class action settlements. In addition, Mr. Volland relied on the expertise of others more knowledgeable in land matters, including Mr. Gottstein's land staff, during negotiations for HB 201.

Some of the objections raised by Mr. Gottstein and Mr. Walker were addressed by the September amendments to HB 201 and HB 371. However, their primary objection is based on their argument that the original trust lands were much more valuable than the combination of land, cash, and the Trust Authority in the HB 201 settlement. This is a factual issue which occupied a major portion of the final approval hearing. Both sides presented the testimony of experts to support their valuation.

The court concludes that counsel for the class supporting the settlement, Mr. Volland and Mr. Jessee, had sufficient experience and access to knowledgeable staff to represent the class adequately. With the views of the four class attorneys equally divided, the court does not consider the support or opposition of the attorneys to be persuasive in determining the fairness of the settlement.

G. Defendant's Ability to Pay (Feasibility of the Settlement)

Given the decline in oil revenues, a settlement such as this one which contains primarily land and some cash is more feasible than one containing more cash. The legislature has already passed

legislation appropriating the $200 million and providing for the land conveyances, establishment of the Trust Authority, and changes in the budgeting process for the mental health programs. Ch. 66, SLA 1991; Chs. 5-6, FSSLA 1994; Chs. 1-2, SSSLA 1994. The court concludes that the State is capable of performing the agreement.

H. Extent of Discovery Completed

The extent of discovery completed is considered because it is an indicator of the ability of the court and counsel to evaluate the merits of the class claims. Armstrong, 616 F.2d at 325. In this case there has been extensive discovery of some types of information and little or no discovery regarding others.

There appears to have been little discovery with regard to the amount the State has spent on past services for beneficiaries. The State has, over the years, provided lists of such expenditures. The plaintiffs have disputed those lists as overinclusive. Evidence of such expenditures would be required at a trial in order to calculate the amount of setoff to which the State might be entitled.[104]

There appears to have been little or no discovery regarding evidence of the State's mismanagement of the trust which could mitigate the setoff for state expenditures on the mental health program. There has been little, if any, inquiry into receipts before the redesignation legislation for which the State has never accounted. Similarly, there are several issues raised in AMHA's Second Amended Complaint that have not been pursued up to this point.

In contrast, extensive discovery has been done with regard to land values and third party titles. These would be major issues at a trial. During implementation of the Chapter 66 settlement, the

[104]Despite the legislature's attempt to establish the setoff amount unilaterally in HB 201, the court views the amount of setoff to be a factual question appropriately determined through the presentation of evidence before a trier-of-fact.

plaintiffs' land office created and collected substantial information about the original mental health trust lands and other state lands which were potential substitute lands. The court also ordered DNR to permit plaintiffs' attorneys the opportunity to review DNR's public files. Memorandum Decision and Order Re: Discovery Motions, at 54-56 (June 3, 1994).

It appears that no amount of additional discovery would completely resolve the land valuation issue. Most of the value attributed to the original and substitute trust lands comes from mineral potential. The mineral potential of most of the land appears to be speculative, inasmuch as virtually no drilling has been done on the lands. The reports and expert testimony at hearings has provided extensive information on this issue.

The court concludes that plaintiffs' attorneys had sufficient information, under the circumstances, with which to negotiate this settlement and evaluate the difficulties of obtaining full relief at trial. The court also finds that the information presented to the court during the preliminary and final approval process has been adequate for the court's evaluation of the settlement and the risks of continued litigation.

VI. RESPONSE TO MAJOR OBJECTIONS TO THE SETTLEMENT

Weiss and AMHA believe that further litigation would at a minimum result in a requirement that the trust be managed solely in the interests of beneficiaries as well as recovery of most of the original trust lands.[105] Weiss & AMHA Opp. to Approval, at 15. They believe that the minimum acceptable settlement should provide the same result. Id. The court believes Weiss and AMHA have overestimated what they will be able to prove at trial and have

[105]Weiss and AMHA expect that all of the original trust lands could be recovered except "(1) parcels subject to land sale contracts (2) parcels actually occupied and used by State agencies, and (3) parcels conveyed to CIRI, although land received in exchange with CIRI could be recovered. Weiss & AMHA Opp. to Approval, at 15.

underestimated the risk that the trust corpus could be smaller after further litigation. However, the settlement should not be judged in comparison with the maximum possible recovery if the class claims were fully litigated. See In re Agent Orange, 597 F. Supp. at 762. The risks accompanying continuation of litigation must be considered simultaneously with the strengths of the plaintiffs' case. Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1408 (D. Minn. 1987). Avoidance of the risks of litigation justify a settlement smaller than the maximum possible remedy.

A. Inadequate Compensation for Value of Original Trust

Weiss and AMHA contend that the total value of the original trust is approximately $1.9 - 2.0 billion, while the value of the HB 201 settlement is $750 million.[106] Weiss & AMHA's Opposition to Final Approval of HB 201 Proposed Settlement, at 4 (October 12, 1994). The assumption that a trial would result in a reconstituted trust valued at approximately $2 billion underlies their argument that the settlement is inadequate. Weiss and AMHA believe that most of the original trust lands could be recovered. Weiss & AMHA Opp. to Approval, at 10, 15. The court disagrees. Weiss and AMHA also insist that the original trust lands could produce enough revenue to meet the necessary expenses of a basic mental health program at least for the trust beneficiaries in greatest need of services. Weiss & AMHA Opp. to Approval, at 21; see also Ch. 66, § 26, SLA 1991 (priorities among beneficiaries). The court disagrees.

Weiss and AMHA suggest that much of the disagreement over value could be avoided by conveying to the trust all original trust land not conveyed to third parties. Weiss & AMHA Opp. to Approval, at 6. They argue that the State's refusal to take this

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[106]The $750 value is derived from an application of Mr. Erickson's deductions. The court stands by its position discussed in the Memorandum Decision on Preliminary Approval that this is comparing apples to oranges. To truly compare original trust to the settlement one would have to make deductions from the $1.9 - 2.0 billion as well. Doing so results in approximately equivalent values.

action is evidence that the original trust lands are more valuable than the State claims. Id.

Weiss and AMHA's argument ignores the fact that over 300,000 acres of the original trust lands are in legislatively designated areas such as parks and wildlife areas. The primary reasons the State refuses to relinquish these lands are reflected in the purposes for the legislative designations rather than in the development value of these lands. In addition, Weiss and AMHA ignore the high probability that trust lands in state parks and similar areas would be extremely difficult to develop due to strong opposition by environmental groups, recreational interests, and others interested in the preservation of whatever wildlife habitat or other values the legislative designations were intended to protect.

Weiss and AMHA argue that delay in production of revenue from some trust lands, particularly those in legislatively designated areas, should not reduce the estimated value of the original trust. Weiss & AMHA Opp. to Approval, at 7. However, delay in revenue production from land due to the time required for development is a valid consideration when compared with the immediate revenue production potential of $200 million in cash. Not only will the cash payment into the trust fund produce revenue sooner, but the risk of producing no revenue at all is much lower than with land development.

Weiss and AMHA have argued that significant development would have occurred sooner on original trust lands if the State had managed them properly. Possibly more drilling to obtain detailed mineral information would already have been done in the most promising mineral areas on trust lands. However, testimony during the final hearing indicated that only one large-scale hardrock mine, the Red Dog Mine, presently operates commercially in Alaska. Original trust land comprises only a small percentage of the total land area in Alaska. If mismanagement was the sole reason for lack of mineral development on trust land, one would expect more than one large hardrock mine to be operating in the state.

B. Specific Lands Comprising the Trust Under HB 201

Weiss and AMHA object to the exclusion of certain original trust parcels, especially those which are already producing revenue. Although the land trust as reconstituted by HB 201 is composed of parcels chosen by plaintiffs' attorneys during the Chapter 66 settlement process, Weiss and AMHA argue that the most valuable parcels in the Chapter 66 settlement are not included in the HB 201 settlement. For example the original trust contained coal deposits in the Healy and Beluga regions, including Usibelli coal leases, which are not being returned under HB 201. The State refused to include these coal lands in the settlement, presumably to avoid objections to the settlement by the coal industry. Class members opposing the settlement point out that royalty payments from the Usibelli leases could have been an immediate source of revenue from trust land without the development delay necessary on most trust lands. Another potential source of revenue are material sites on original trust land that are likely to be used for road construction or other construction projects. Some of these sites have been included in the reconstituted trust under HB 201, but others have not.

Weiss and AMHA argue that elimination from the trust of all parcels to which there existed any serious objection during settlement negotiations has significantly decreased the potential for revenue production from trust lands. Weiss & AMHA Opp. to Approval, at 17. Several class members expressing opposition to the settlement were suspicious that trust lands no one else wanted were not worth much. Given that so many non-class interests appeared to have "first pick" from original trust lands and the pool of potential substitute lands, the suspicions of class members are quite understandable.

Everyone agrees that the lands in the reconstituted trust under HB 201 have a total value less than that of the original trust lands. The difference in value is compensated with the $200 million cash payment and establishment of the Trust Authority. Weiss and AMHA themselves state that the $200 million cash can

be expected to annually earn approximately six times the amount of the royalty from the Usibelli lease. If litigation continues, the trust is unlikely to obtain any cash with which to earn an immediate annual income of six million dollars. In addition, at least one substitute parcel has high mineral potential since a portion has been leased for the Fort Knox gold mine near Fairbanks.

Groups which intervened in opposition to Chapter 66 were actively included in negotiation of the HB 201 land lists. Coal companies, oil companies, environmental groups, and hardrock miners were included in negotiations for the HB 201 settlement to avoid the kind of opposition that greatly delayed and complicated the court's consideration of the Chapter 66 settlement. There has been no outside opposition to HB 201.

Proponents of the settlement also hope the early involvement of environmental groups will enable the trust to develop most trust lands without interference from environmental interests. This should decrease the amount of time and money necessary to develop many of the trust lands, thus increasing the overall net revenue to the trust.

C. Possibility of Legislative Actions Contrary to the Settlement

A major concern of class members objecting to the settlement is the ability of the legislature to pass legislation in the future that would materially change the terms of the settlement after the claims of the class have been dismissed with prejudice. It is true that nothing in HB 201, the Settlement Agreement, or this decision can prevent a future legislature from passing legislation affecting the trust, but there are remedy provisions if this happens and deterrents exist.

First, the State has specifically agreed in the Settlement Agreement not to oppose a new action brought by plaintiffs under Rule 60(b) for relief from judgment in the event of a material

breach of the Agreement.[107] Settlement Agreement, art. VI, §§ 5 and 7, at 14-15, 17; see also State's Reply to Weiss' and AMHA's Opp. to Approval of HB 201 Proposed Settlement, at 34 n.23 (October 19, 1994) (reflects State's intent). A few class members have expressed the fear that a court receiving such a motion would be reluctant to grant such relief unless the legislature's action is particularly egregious. Nevertheless, the Rule 60(b) motion is an available remedy for a material change made in this settlement unilaterally by a future legislature. Alaska R. Civ. P. 60(b)(6). For as long as any legislators remember this lawsuit or have heard of its impact on state land, the threat of litigation alone will be a powerful deterrent.[108]

Of course, if a court grants plaintiffs relief from the judgment dismissing their claims with prejudice, the State would be expected to argue that HB 201 was curative legislation which retroactively made the 1978 redesignation valid. See State's Opening Pre-Hearing Memorandum in Support of Final Hearing, at 22-26

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[107]The following provisions of HB 201 constitute material terms of the agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50, and 51 of HB 201 and sections 1 and 2 of HB 371. Settlement Agreement, art. VI, § 5, at 15 (June 10, 1994). If the Legislature materially alters or repeals any of those provisions, the plaintiffs' remedy is a new action alleging that the mental health trust has not been adequately reconstituted and seeking whatever relief may be appropriate in light of the plaintiffs' claims. Settlement Agreement, art. VI, § 5, at 15. The Settlement Agreement also provides that "failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment [pursuant to Alaska Civil Rule 60(b)(6)] and no party shall oppose such a motion." Settlement Agreement, art. VI, § 7, at 17.

The State has specifically declared that if a future legislature materially alters or amends any of the material terms in HB 201, the State could not defend on the ground that the plaintiffs had agreed in the Settlement Agreement that the trust was adequately reconstituted. State's Reply to Weiss' and AMHA's Opposition to Approval of HB 201 Proposed Settlement, at 34 n.23 (Oct. 19, 1994); Settlement Agreement, art VI, § 5, at 14. The plaintiffs could file a new case at essentially the same place at which this case is being settled. State's Reply, at 34 n. 23. The only major difference would be the effects of time on land titles and land usage.

[108]The institutional memory of the legislature may not be long, but one function of the Trust Authority is to serve as a reminder of the trust obligations owed to the beneficiaries.

(Oct. 11, 1994). The State's ability to make such an argument is not a flaw in the settlement, but is merely a result of the legislature's passage of HB 201 and HB 371. The State has already suggested that such an argument will be made if this settlement fails and litigation continues. Plaintiffs would be in the position they will be if the settlement is not approved.

Second, the Trust Authority will exist as an advocate for the trust. The Trust Authority can be expected to actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority also may be in a position to influence the governor to veto any legislation which makes a material change in this settlement. Given the notoriety of this case, it is unlikely the legislature could override such a veto.

Third, stability in land titles and state land management is in the interest of third parties, such as purchasers of state land, hardrock miners, and oil companies. Such third parties would undoubtedly lobby the legislature to maintain stability in land titles in order to avoid disrupting land development in Alaska with another lawsuit.

D. DNR Management

One of Weiss and AMHA's concerns about DNR management of trust lands under HB 201 is the section 17(b) requirement that trust lands be managed under laws applicable to other state lands. Weiss and AMHA suggest that the "maximum management for the benefit of the Trust achievable under the HB 201 regime is the minimum permissible under the Enabling Act." Weiss & AMHA Opp. to Approval, at 20. They seem to ignore the reference in section 17(b) to subsection (a) of section 17 which means that management under state land laws is subject to the State's trustee duties under the Enabling Act. At the same time, their concerns legitimately arise from an emphasis in the language of section 17(b) on management according to laws applicable to the

State's general grant lands rather than management for the benefit of the trust.

Another concern about section 17 is the provision within subsection (c)(4) calling for "management for multiple use of trust land." The term "multiple use" is a common land management term, and yet the meaning often varies with one's viewpoint. With regard to mental health trust lands, environmental groups can be expected to emphasize recreation, fish habitat protection, and similar uses involving little development. Mining and forestry interests will emphasize uses involving the extraction of natural resources.

Subsection (c) lists three other considerations which the regulations implementing section 17 management of trust lands must address, two of which are "maintenance of the trust land base" and "management for the benefit of the trust." Ch. 5 § 17(c), FSSLA 1994. Weiss and AMHA discuss the existence of a conflict in the HB 201 management scheme. If section 17 is viewed in its entirety, however, there is actually no conflict between the subsections. Management for multiple use of trust land is appropriate to the extent that all management decisions are made in accordance with trust principles. Ch. 5 § 17, FSSLA 1994. For example, a parcel might be suitable for a temporary interim use until a particular resource can be extracted more profitably or a material site might be sold or leased for another use after the usable material has been extracted. It might be possible to sell the timber on a parcel before a mine is developed.

HB 201 requires DNR to consult with the Trust Authority as well as submit annual reports describing management activities on trust lands.[109] Ch. 5 § 9, FSSLA 1994. The separate trust unit of DNR probably will be funded by money allocated from the trust

[109]DNR must obtain actual approval from the Trust Authority before exchanging trust land under AS 38.05.801(b)(2).

income account by the Trust Authority.[110] Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041). See also Settlement Agreement, Att. C & D (June 10, 1994) (Reimbursable Services Agreement will probably be used to pay DNR from trust account). When the Trust Authority contracts with DNR to manage trust land, as required by HB 201, the Authority can include provisions requiring DNR to actively promote mineral exploration or other development activities deemed appropriate by the Trust Authority. See Ch. 5 § 9, FSSLA 1994.

E. Trust Authority Has Responsibility for Preserving Trust Assets Without the Management Authority

Weiss, AMHA, and some of the class comments opposing the settlement are concerned about placement of fiduciary responsibility with the Trust Authority while actual management authority is in the hands of DNR and the Permanent Fund Corporation. Both agencies managing trust assets are required only to consult the Trust Authority in most circumstances.[111] The objectors insist this gives DNR and the Permanent Fund Corporation power over trust assets without any accountability, because the agencies have no express fiduciary responsibility to the trust. They object to the Trust Authority bearing the burden of being responsible for proper management of trust assets without the power to direct the management.

The advantage of this split in responsibilities is that each of the three entities can concentrate in their area of expertise. The Alaska Permanent Fund Corporation has demonstrated its ability to manage a similar monetary fund satisfactorily. There were few comments against management of the $200 million by the Permanent Fund Corporation. DNR has a marred history, but the agency has personnel with much experience and technical expertise

[110]HB 201 provides that money in the income account "may only be used for" six listed purposes, one of which is reimbursement to DNR for the cost of managing trust land. Ch. 5 § 16, FSSLA (to be codified as AS 37.14.041).

[111]One exception is the exchange of land, which requires Trust Authority approval. Ch. 5 § 9, FSSLA 1994.

in managing large tracts of land in Alaska.[112] This leaves the Trust Authority to concentrate on coordinating with the four legislatively-established groups representing the major beneficiary groups to plan services to meet the needs of beneficiaries and to budget the money to fund the services. The Trust Authority can hire staff, which makes the Trust Authority much more than advisory commissions of the past. For the first time, the mental health community will have an advocate within state government with the potential to draw attention effectively to the needs of beneficiaries.

The court agrees, however, that it would be better if either the Trust Authority had complete management responsibility or the Trust Authority was free not to contract with DNR and the Permanent Fund Corporation. However, this determination has little to do with whether the HB 201 should receive final approval. The court may not compare this settlement with an ideal settlement. The appropriate task is to compare this settlement with the likely results of litigation. The likely result of litigation is general directions to the State to manage the trust in the interests of the beneficiaries and under the Enabling Act. The court does not believe that DNR management with those directions would be better than management as provided by the settlement.

F. Concern Regarding Constitutionality of the Trust Authority's Power to Spend Trust Income

Weiss and AMHA argue that the Trust Authority's power to spend the trust's income free from further legislative appropriation is an illusion. They contend that the legislature did not clearly give the power to the Trust Authority in HB 201, and if

[112]In addition, the director of the separate unit is expected to be hired from outside of DNR. Final Hearing, Testimony of DNR Commissioner Harry Noah (Oct. 25, 1994). This will decrease the likelihood that previous DNR policies would be applied again to trust lands.

the legislature intended to give such a power to the Trust Authority, it may be unconstitutional.[113]

Only the Settlement Agreement expressly gives the Trust Authority the right to spend trust income free from further legislative involvement. Settlement Agreement, art. V, § 4, at 12. HB 201 grants the Trust Authority the power to administer the income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.039(a)). The purposes for which money in the trust income account may be used are listed in detail in HB 201. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.041). HB 201 also specifically gives the Trust Authority the authority to award grants and contracts funded by money from the trust income account. Ch. 5 § 16, FSSLA 1994 (to be codified as AS 37.14.045).

"[A]ny illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis." Armstrong, 616 F.2d at 320. Neither the Settlement Agreement nor HB 201 is obviously unconstitutional. When reviewing a settlement, a court should not rule on any legal issue not necessary for settlement. See Armstrong, 616 F.2d at 320.

G. Concern that the Legislature Will Cut Mental Health Funding From the General Fund

Despite the overwhelming concern about funding in many class comments, the claims brought in this lawsuit have no direct relationship to funding for services. The claims focus on the State's breach of the trust established by the Enabling Act in 1956. From the beginning of this lawsuit, there appears to have been misconceptions among many people about the extent to which the trust was capable of producing sufficient revenue to support the state's mental health program. There was no guarantee of adequate

[113]The Alaska Constitution grants the legislature the exclusive power to appropriate state funds. Alaska Const., art. IX, § 13.

funding in the original trust; the lack of guarantee in the settlement certainly cannot make it inadequate.

The HB 201 settlement expressly states that basic mental health funding will continue to come from the general fund. There is no pretension that the reconstituted trust will be able to support the state's basic mental health program. The legislature cannot avoid its responsibility to the state's mentally ill, mentally retarded, and other disabled Alaskans who are beneficiaries by reliance on the trust. One of the Trust Authority's functions will be to act as an advocate for the integrated comprehensive mental health program's general fund budget. The budgeting advantages should help the Trust Authority in that advocacy.

A related concern expressed by Weiss and AMHA is the possibility that the basic mental health program will receive insufficient funding from the legislature and that trust income will be spent on nonessential services. They believe the Trust Authority should be required to spend trust income on the basic program if the basic program is not adequately funded.[114]

Their underlying concern appears to be that the Trust Authority might spend the trust income on services for alcoholics and the mentally retarded, who are represented by counsel supporting the settlement, while services for the mentally ill are inadequately funded from the general fund. There is no reason to assume that the Trust Authority would favor one group over another. Each of the four beneficiary groups will be equally represented on the panel which recommends individuals to be members of the Board of Trustees of the Trust Authority. The Trust Authority has a duty to "deal impartially with the different trust beneficiaries." Ch. 5 § 8, FSSLA 1994, amending Ch. 66 § 10, SLA 1991 (to be codified as AS 37.14.007(b)(12)). In addition, the court has defined the beneficiaries in terms of the

[114]Ironically, the requirement desired by Weiss and AMHA could actually encourage the legislature to underfund the basic program.

groups who may not be excluded from trust-funded services. Memorandum Decision and Order, at 16-17 (April 27, 1988).

VII. CONCLUSION

Settlement involves compromise by all parties. The State could attempt to obtain a large setoff to eliminate any cash payment. The class could litigate third party interests and legislative designations in order to increase the amount of original trust land returned to the reconstituted trust. However, the costs in money and delay would be so enormous that it is doubtful any party would emerge better off. The beneficiaries of the trust would continue to wait for whatever benefits resolution of this case might bring them. Already one of the named plaintiffs, Carl Weiss, has reached adulthood without resolution of the case bearing his name. Even when viewed in the best possible light, litigation will not bring enough additional benefit to the trust and its beneficiaries to warrant the additional costs and delays required.

This case began in 1982 and the parties have attempted settlement since 1985. This settlement may not meet the expectations of the class for full funding of an integrated comprehensive mental health program, but it is fair, adequate, and reasonable under the circumstances of this case. In view of this settlement, continuing this litigation would merely "contribute to the seemingly Methuselean duration of this case," and would "sacrifice [both] justice and efficiency without any rational basis." Armstrong, 616 F.2d at 327.

The court is required to protect the interests of the class within its best judgment, considering all relevant factors. "The strong opposition of a considerable number of sincere and well-motivated members of the class cannot, under these circumstances, be decisive." In re Agent Orange, 597 F. Supp. at 763. There has been and continues to be a critical shortage of services for class members. Clearly mental illness, retardation, and other conditions within the class definition place a heavy burden on the individuals suffering from these conditions and their families. However, this

single case alone cannot resolve the funding crisis in the mental health field, no matter how compelling and real the need is for many class members. The citizens and the legislature of Alaska must face the obligation to provide adequate mental health services for the less fortunate among us.

This litigation has accomplished some very important things. First, it has made people aware of the mental health trust and the fiduciary obligation of the State with respect to that trust. The court does not believe that the State would dare treat these lands like other state lands without regard to the State's fiduciary obligations. If it does so, there are people and institutions prepared to stop the action before much damage is done. The beneficiaries, though perhaps weak by themselves, are strong together. They have advocacy groups with long institutional memories. The Trust Authority, if it does its job, will serve as a watchdog to ensure that neither DNR nor the legislature mismanages these trust lands again. Whatever else has been learned, it must have been learned that these lands must be managed in the best interests of the beneficiaries. If anyone tries to assert a lesser standard, without question there will be more litigation. If the State is wise, it will not fall back into this quagmire. Second, the litigation has provided a mechanism for the beneficiaries to influence both the funding of the comprehensive mental health program and the planning of state programs. The Trust Authority is an integral part of this settlement; without it, the court probably would not have granted final approval. Whether the reconstituted lands trust will produce or the original lands trust could have produced sufficient funds to maintain adequate services could be debated forever without resolution. However, it is clear that the sometimes powerless have been empowered. The Trust Authority can be a powerful advocate for the real needs of those who have so much difficulty advocating for themselves.

The settlement process as a whole has done some harm. The class and their families are very divided on the question of this settlement. Some may feel cheated and abandoned by this decision approving it. Others may feel vindicated. Hopefully, neither will

persist in those feelings. Whether or not to approve this settlement was a very difficult and complex decision. The court shares many of the concerns that have been expressed by the class. The task that lies ahead for the beneficiaries, their friends and families is to come together to make the best of this agreement. The beneficiaries will need to speak with one voice once again, if their concerns are not heeded. They need to heal the divisions that exist today and vow as recommended by one commenting beneficiary to go "out of the courts and into the budget."

The court is responsible for ensuring that the settlement is in the best interests of the class as a whole in view of all the factors to be considered in final approval. Given the circumstances of this case and the complex factual and legal issues that would arise in further litigation, the court finds that the settlement submitted for approval on June 10, 1994 is in the best interest of the class.

ORDER

For the reasons discussed above, it is ordered that FINAL APPROVAL for the settlement contained in Chapters 5 and 6, FSSLA 1994, Chapters 1 and 2, SSSLA 1994, Chapter 66, SLA 1991, and the Settlement Agreement signed on June 10, 1994 is GRANTED. The court is distributing a proposed dismissal order to the parties.

DATED at Fairbanks, Alaska this 6th day of December, 1994.

MARY E. GREENE
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; and ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; H. L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,	)	FILED in the Trial Courts State of Alaska Fourth District APR 27 1988
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

Case No. 4FA-82-2208 Civil

MEMORANDUM DECISION AND ORDER

This matter comes before the court to determine the intent of Congress in creating the public trust designed to meet the necessary expenses of the mental health program of Alaska in Section 202 of the Alaska Mental Health Enabling Act, Public Law 84-830 (1956) ["AMHEA"]. The matter before the court is the second stage in the litigation over the mental health lands. In State v. Weiss, 706 P.2d 681 (Alaska 1985), the Alaska Supreme Court held that the State breached its duty as trustee in its treatment of the mental health trust lands. The Court declared

invalid legislation which redesignated the mental health lands as general grant lands and remanded the matter for reconstitution of the trust. Since the remand, a number of advocacy groups have intervened as plaintiffs in the action. Additionally, in 1987, the legislature took significant action relating to the Alaska mental health trust in Chapter 48 of SLA 1987. This matter is before the court in a procedurally complex way. However, fundamentally, each of the parties is requesting a determination by the court that a particular group or groups either is or is not a beneficiary of the mental health trust. Although some of the motions have been framed in terms of redesignation of the class, clearly no one intends that the class be redesignated. What is at issue here is the definition of who is entitled to benefit from the trust. Because of the large number of parties and the disparate positions involved, it is useful to state the positions of the various parties.

Intervening plaintiffs Bosel, Doulin, Goodwin, and Mayoc ["Bosel"], argue that the mentally retarded and mentally defective are among the intended beneficiaries of the AMHEA land trust and that the State of Alaska does not have the authority to delete mentally retarded or defective persons as beneficiaries of the land trust. Through tracing the legislative history of the AMMEA, Bosel argues that Congress intended to benefit the mentally retarded or defective individual. Bosel further argues that based on the law as applied to land grants to the territories and basic trust principles, the State of Alaska cannot modify the trust provisions of the AMHEA to exclude mentally retarded or defective individuals from the trust.

The State of Alaska argues that the primary intent of Congress in the AMHEA was granting plenary authority to the Territory, now State, over its own mental health program. From this, the State argues that it is within the sound discretion of the State to determine what group or groups are to be served by the mental health program and thus are to benefit from the mental health lands trust. The State further argues that at the present time the legislature has removed the mentally retarded and mentally defective from the State's mental health program.

H.L., M.K., and Alaska Addiction Rehabilitation Services ["AARS"] assert that the Congressional intent was to fund a comprehensive program of integrated mental health services in Alaska, including in-patient, out-patient and preventative care. AARS argues that this comprehensive program was to address, at the very least, the needs of the territory's chronically and acutely mentally ill, chronic alcoholic, mentally defective, retarded and senile. AARS supports its position with legislative history. AARS also argues that the State has no discretion to determine the beneficiaries in that tie State must first apply the trust income to a comprehensive mental health program for the benefit of the chronically and acutely mentally ill, chronic alcoholic, retarded, and mentally defective.

Plaintiff intervenors Alaska Mental Health Association, Nanuwak and Martin, take the position that Congress determined the types of individuals to receive benefits under the AMHEA but left to the State the decision of how to meet the needs of those individuals. These plaintiffs argue that Congress deliberately excluded the mentally retarded and mentally defective from receiving benefits under the trust. The primary focus of the Alaska Mental Health Association's argument is that the State may not remove beneficiaries from nor add beneficiaries to those intended by Congress.

Plaintiffs Vern T. Weiss, et al., argue that Congress gave the Territory, now the State, the authority to determine its own mental health program; that under trust law principles, the beneficiary of the mental health trust established by AMHEA is the mental health program itself; and that the legislative history reveals that it was Congress' intent to exclude the mentally retarded and mentally defective from the trust; or alternatively, that even if the mentally retarded and mentally defective were originally included among the beneficiaries, they have been subsequently removed by the State pursuant to a rightful exercise of its delegated authority from Congress.

The Alaska Alliance for the Mentally Ill has filed a brief as amicus curiae. The Alliance opposes the positions taken by the State and by Bosel and supports the position taken by the Alaska Mental Health Association.

In order to answer the question posed in this portion of the litigation, it is necessary to analyze the legislative history of the Alaska Mental Health Enabling Act in some detail. In the Organic Act of Alaska, the act of August 24, 1912, 37 Stat, 512, the territorial legislature was precluded from changing the existing law regarding the commitment of the insane. Under the then existing law, a person was committed by being charged as if criminally with the offense of being an insane person at large. The issue was necessarily submitted to a jury for the determination of whether the person was sane or insane. There were no procedural safeguards protecting either the rights of the person accused of being insane nor the rights of the public with respect to dangerous individuals. Under this law, if a person was adjudicated insane they would be committed to the custody of the U.S. Marshals for transportation to a mental hospital. Throughout all or most of the time, Morningside Hospital in Portland received the persons from Alaska who had been adjudicated insane. Various reports give differing views as to the adequacy of care received by patients at Morningside. However, it is clear from the documents provided that there was much opposition in the Territory to the placement of patients in the facility at such great distance from friends and family. Thus, as Congress began to address the issues regarding the delivery of mental health services in the Territory of Alaska, there were two primary issues; (1) revision of the commitment procedures: and (2) the perceived need to treat Alaskan patients in a facility nearer to their homes. As the matters were considered, the corollary issue of funding for a mental health program by the Territory also arose. Prior to the 84th Congress, there had been several

unsuccessful attempts to modify the law. See Appendices S. T. U.1[1]

H.R. 6376, which ultimately became the Alaska Mental Health Enabling Act, was one of several bills introduced in the 84th Congress dealing with the issues presented by the mental health laws in Alaska. As passed by the House, H.R. 6376 had three main provisions. First, in Section 3 of the bill, the Territory of Alaska was granted the authority "to enact such laws as it may deem appropriate relating to the hospitalization (including commitment), care, and treatment of residents of or persons in Alaska who are mentally ill . . . ." Appendix I at 4. Second, in Title I of the bill, new commitment procedures for the hospitalization of the mentally ill were enacted, Under the authority of Section 2, the territorial legislature was empowered to supercede any of the provisions of Title I. Of particular note to the questions before the court, Section 101(i) defined the term "mentally ill individual" as "an individual having a psychiatric or other disease which substantially impairs his mental health or an individual who is mentally defective or mentally retarded." Appendix I at 5. Third, the bill provided grants to the territory to provide monies for the Territory's assumption of financial responsibility for the mentally ill. In Section 201, continuing, decreasing appropriations were made for "an integrated mental health program for the Territory, including the out-patient and in-patient care and treatment of the mentally ill as defined in Title I of the Alaska Mental Health Act," and a grant of $6.5 million was made "to be used in the construction of hospital or other facilities in Alaska needed for the carrying out a comprehensive program for the mentally ill as defined in Title I of the Alaska Mental Health Act. Appendix I at 33 and 36. In Section 202 of the bill, the Territory was granted the right to select land not to exceed one million acres from the public lands in Alaska. Subsection (e) of that section provided, in part:

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[1] All references to Appendices are to those supplied by Bosel, unless otherwise indicated.

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and the income therefrom shall first be applied to meet the necessary expenses of the program for the hospitalization and care of the mentally ill in Alaska. Such lands, income, and proceeds shall be Managed and utilized in such manner as the legislature of Alaska may provide.

Appendix I at 39-40. Given the usage of the term "mentally ill" in Title II, and particularly in Section 202(e), it is very likely that the House intended the lands trust to benefit the mentally ill as defined in Title I, i.e., people "having a psychiatric or other disease which substantially impairs [their] mental health" and people who are "mentally defective or mentally retarded."

Between the time that H.R. 6376 was passed by the House and its consideration by the Senate, there was a significant uproar from the far right. This uproar, sometimes noted as the "Siberia, U.S.A." discussions, was based on a misinterpretation of H.R. 6376; the detractors viewed H.R. 6376 as an effort to create one million acres in Alaska to be used as a gulag-type detention area for politically "wrong-thinking" people. During the bill's consideration in the Senate committees, there was a great deal of public comment and testimony regarding the much publicized misconception. See Appendix D. At least in part as a result of the "Siberia, U.S.A." discussions, a subcommittee in the Senate rewrote H.R. 6376 in an amendment which "[struck] all of these controversial provisions from the bill [Title I], leaving it up to the people of Alaska to enact their own mental health program." Appendix P at 1, Senate Committee Report No. 2053.

The legislative history of the Senate's consideration of H.R. 6376 provides some support to each side of this dispute. After the public hearings were concluded, the Subcommittee on Territories and Insular Affairs of the Committee on Interior and

Insular Affairs apparently went through a section-by-section markup. See Appendix D at 244-45; Appendix K; Appendix L; Appendix M; Appendix N: and Appendix O. The various committee prints considered during this time, taken in combination with the existing legislative history, provide some indication as to the thinking of the Senate subcommittee. The first in time of these committee prints is found in Appendix K.[2] This committee print points out recommendations made by the Association of American Physicians and Surgeons[3] and by the Departments of Health, Education and Welfare and Interior. One of the recommendations made by the AAPS was the elimination of the mentally defective and mentally retarded from the definition of mentally ill individual in Section 101(i). Appendix K at 5. The next committee print, Appendix L, added the comments of HEW to the committee print of Appendix R. HEW noted its opposition to the change proposed by AAPS and also stated:

> The change in the definition would have the effect also of excluding the mentally defective or retarded from provisions for institutional care or the benefits of the programs aided by grants under Title II.

Appendix L at 6.

Appendix M, Committee Print No. 4, April 20, 1956, shows both the Goldwater substitute and HEW proposed amendments.[4] In the original Goldwater substitute bill, Section 202(e) read, in part:

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[2] Although this is the first committee print submitted, it is apparent that the Goldwater substitute was available at least by March 23. See Appendix P at 21.

[3] The source of the Association of American Physicians and Surgeons' recommendations can be found in Appendix D at 258.

[4] The HEW comments on this April 20 committee print are probably those which accompanied the letter from HEW's assistant secretary, Roswell Perkins, to Senator Goldwater. Appendix P at 21-22. This letter urged Goldwater to retain the provisions in Title I unless such retention would jeopardize the passage of the bill. Additionally, Perkins provided a staff markup of suggested amendments "so as to make clear beyond doubt that the benefits of the bill could

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust, and the income therefrom shall first be applied to meet the necessary expenses of the program for the hospitalization and care of the mentally ill in Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide.

Under the HEW suggestion, Section 202(e) would have read:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any distribution thereof, shall be administered by the Territory of Alaska as a public trust, and such proceeds and income therefrom stall first be applied to meet the necessary expenses of the mental health program of Alaska, including (but not by way of limitation) the out-patient and in-patient care and treatment of the mentally ill, and of the mentally defective and mentally retarded, of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide in part.

Appendix M at 12. Committee Print No. 5, Appendix N. was printed April 26, 1956, a few days after Appendix M. Committee Print No. 5 was a draft of provisions which had been approved in principle by the Subcommittee on Territories. In comparing Committee Print No. 4 with Committee Print No. 5 it is apparent that some but not all of the changes proposed by HEW were accepted by the subcommittee. Committee Print No. 5 has

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be made available to the mentally retarded and mentally deficient,.as well as those who are in a strict sense mentally ill." Appendix P at 22.

nothing of the original Title I of the bill. Section 202(e) provided in part:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and the income therefrom shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide.

Appendix N at 9. This language was unchanged in Committee Print No. 6, Appendix O. The Goldwater amendment, as amended, was the substitute bill reported out by the committee. Appendix P at 29-34. Section 202(e) as report out was the same as it appeared in Committee Print No. 5.

The Senate Interior Committee Report, Report No. 2053, Appendix P. notes that the committee substitute is the amendment proposed originally by Senator Goldwater, "with certain clarifying changes. " Appendix P at 2. The report states:

> Under the House bill, the Territorial Legislature of Alaska could have annulled or amended any of the sections relative to commitment, hospitalization, and care at any time.
>
> However, the proposed provisions were misunderstood by many persons in parts of the country other than Alaska. Partly as the result of this misunderstanding, but more because the members of the committee are convinced that the people of Alaska are fully capable of drafting their own laws for a mental health program for Alaska, the committee concluded that authority should be vested in them in this field comparable to that of the States and other Territories.

> Hence, Senator Goldwater's amendment was adopted, the substance of which is the striking of the commitment procedures in Title I of the House bill. In so doing, the committee wishes to go on record as stating emphatically that its action is in no way a repudiation or disapproval of the provisions approved by the House of Representatives and endorsed by such a large number of qualified experts.

Appendix P at 3. With respect to the land grant of one million acres, the report notes:

> The income and proceeds from disposition of these lands must be administered as a public trust, with the expenses of the mental health program having first call on such funds. Amounts not needed for the mental health program can be used for other public purposes as the legislature may determine,

Id. The report also noted that the purpose of the grant was to "afford revenues to the Territory for support of its mental-health program." There is nothing in the committee report which expressly states what the committee meant by "the mental health program of Alaska," or who the intended beneficiaries of the public trust were.

After the House failed to concur in the Senate amendment, the matter went to conference committee. See Appendix R. The conference committee recommended that the House recede from its disagreement to the amendments of the Senate and agree to the passage of the bill with one further amendment not germane to this issue. In comparing the House and Senate versions of H.R. 6376, the House Managers stated:

> Both versions of Title II of H.R. 6376 are identical in substance but with a minor change in wording. The House-passed bill provided that the monetary returns realized from the land grants would be administered by

> the Territory of Alaska as a public trust for the hospitalization and care of the mentally ill in Alaska. The Senate-reported bill specifies that these returns shall be applied to meet the necessary expenses of the mental-health program in Alaska. The managers on the part of the House accepted this Senate amendment which broadens the use of the revenues for use of the Alaska menta1-health program rather than for the hospitalization and care of the mentally ill in Alaska.

The bill as recommended by the conference committee was finally passed and became the Alaska Mental Health Enabling Act.

The bill as enacted required the Territory to submit a plan for the approval of the Surgeon General before the Territory would receive the yearly grants-in-aid. Appendix X to the Bosel reply memorandum is the report by the Territory to the Surgeon General of May 7, 1957. From this report it is clear that at that time the "integrated mental health program for Alaska" included the mentally deficient. See pp. 7 and 10.

In 1957 the territorial legislature enacted its first "mental health program." 1957 Session Laws of Alaska, ch. 87. In that act, the territorial legislature defined "mentally ill individual" as an individual having a psychiatric or other disease or senile changes which substantially impair his mental health or who is mentally deficient," ACLA § 51-4-20a(1) (1958 Supp.).

The legislative history and historical events must also be considered in light of the perceived problem which Congress was addressing when it enacted the AMHEA, viz. the treatment of Alaskan individuals who had been adjudicated insane and placed at the Morningside Hospital in Portland. An early impetus to all of the legislation regarding Alaska commitment procedures was the Overholser Report on the Morningside Hospital in 1950. Appendix V. The report was the product of an investigating

committee designated by the Department of the Interior,[5] chaired by Dr. Wilfred Overholser. The Overholser Report noted the inadequacy of the mental health program in Alaska and called attention to the archaic commitment procedures which treated the mentally ill as "criminals" who were convicted, committed and transported in custody to Morningside. The investigating committee made several long-term recommendations, including: the construction of a modern mental hospital in Alaska to provide treatment for chronic and acute cases; and (2) creation of a 50-bed treatment center at Mt. Edgecumbe to care for acute cases from southeastern. The committee also recommended immediate changes to be accomplished through legislative action, including: (1) development of a comprehensive mental health program under territorial control serving educational purposes; (2) provision for emergency treatment and observation centers in the general hospitals in the territory; (3) revamping of legislation for commitment and voluntary admission for hospitalization: and (4) provision for territorial control of all public mental health services in Alaska.

It is also important to note that the patients from Alaska who were treated at Morningside were not just individuals suffering from chronic psychiatric illnesses. Many of those who were admitted to Morningside were mental defectives. See Appendix W at 741; Appendix X. Also included among the patients at Morningside were those suffering from alcohol psychoses and the senile. The 1957 study by the Public Health Service done at the direction of Congress after the enactment of the AMHEA found that as of March 22, 1956, of the 379 patients in the hospital, 89 were mentally retarded patients. Appendix v at 762. That survey concluded:

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[5] Before the enactment of the AMHEA, the Department of Interior was responsible for the care and treatment of persons in Alaska who were adjudicated legally insane. Thus, it was the responsibility of the Department of the Interior to supervise the hospital at which Alaskan patients were placed, Morningside"

> There is a need for construction of mental health facilities in Alaska if the Territory is to conduct an effective mental health program for its citizens. These facilities should provide for housing in-patient services, out-patient services, and preventive services for the mentally ill and the mentally retarded of all ages and for alcoholic and senile patients.

The questions presented in this portion of the litigation are difficult ones. There is support for the position taken by each of the parties. When considering all of the information available in light of the historical facts, it is the conclusion of the court that Congress intended that the Territory establish a comprehensive mental health program which would provide services to a group consisting of at least those individuals suffering from a psychiatric illness who may require hospitalization and the mentally defective and retarded.[6] Further, it is the conclusion of the court that Congress intended that the mental health lands public trust benefit the recipients of the services of the comprehensive mental health program, which group must include, at a minimum, the mentally ill who may require hospitalization, and the mentally defective and retarded. The court concludes that it is within the discretion of the State to include other groups as recipients of services by the mental health program but it is not within the discretion of the State to exclude either of those two groups.

Based on the legislative history, it is clear to the court that Congress did not intend to exclude the mentally deficient and mentally retarded as beneficiaries of mental health lands trust. First, there is no question that it was the intention of the House to include the mentally defective and retarded as beneficiaries of the trust. Further, when HEW pointed out to the Subcommittee on Territories that its bill might be interpreted as excluding the

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[6] The court does not exclude from this operative definition either chronic alcoholics suffering from psychoses or senile people who as a result of their senility suffer major mental illness.

mentally defective and retarded from the benefits of the AMHEA, the Subcommittee responded by modifying the language and adopting a portion of the language proposed by HEW. Specifically, HEW proposed the term "the mental health program of Alaska" which was ultimately adopted. Compare Appendix M Section 202(e) with Appendix N Section 202(e). What the Subcommittee failed to include was a very cumbersome "including but not limited to" interpretative phrase. Given that the term "mental health program" is the term used throughout the legislative history and testimony as the broadest term for what was proposed or anticipated, the court concludes that the Subcommittee's use of that term intended a broad-reaching definition. Moreover, the court relies on the statement in the conference committee report that the change in language from the House language in Section 202(e) to the Senate version of Section 202(e) "broadens the use of the revenues for use of the Alaska mental health program rather than for the hospitalization and care of the mentally ill in Alaska." Surely, the House managers recognized that the language of Section 202(e) as adopted by the House provided for the use of the funds to pay for the expenses of the care and hospitalization including the mentally defective and retarded. Had the Senate intended something different, the House managers would not have characterized the change as one which broadened the use of the funds. Moreover, the court is persuaded by the historical facts that Congress did not intend to exclude the mentally defective and retarded from the benefits of the Alaska Mental Health Enabling Act and its grants. First, the Public Health Service in its 1957 survey reported to Congress on the needs of the mentally defective and retarded. Second, Alaska's integrated mental health plan submitted to the Surgeon General included the treatment of the mentally defective and retarded. The plan was obviously accepted by the Surgeon General without action by the Congress. Finally, Alaska's first mental health program enacted by the territorial legislature clearly included the mentally defective; despite its authority to do so, Congress did not amend the legislature's act.

There is no question that Congress was also concerned with giving the Territory of Alaska the power to solve its own problems in the mental health field. The overall purpose of the grant of lands and the public trust established in Section 202(e) was to provide a financial basis of support for the territory's program. Thus, it is apparent as well that the Congress intended to give the Territory, now the State, discretion in the way the funds were spent. For example, the effect of the Senate' s broadened language would permit the spending of funds for out-patient care to those who would not need hospitalization and thus a new group of beneficiaries, those suffering from mental illness not requiring hospitalization, could be added by the legislature in the legitimate exercise of its power.

The legislative history does not support the State's broad view of its discretionary authority. Under the State's view, it has the power to include or exclude any group from the benefits of its mental health program. The State argues that its discretion would include the power to exclude those suffering from a traditionally recognized mental illness requiring hospitalization in appropriate circumstances. The court cannot agree that it was Congress' intent to grant such broad discretion to the State. First, it must be recalled that Congress intended the Territory to deal with the Morningside problem. Had the legislature and territorial government not dealt with the individuals who were placed at Morningside but rather had chosen a "mental health program" that merely improved the mental health. and disposition of otherwise healthy people, surely Congress would have taken action. The reason that Congress would have taken action is that its intent was not being fulfilled. Congress clearly intended that the patients at Morningside be cared for under the State's mental health program; thus, Congress intended that the funds and lands given to the Territory, now State, be used to benefit those suffering from mental illnesses requiring hospitalization and the seriously mentally defective and retarded. Second, Congress maintained federal control over the disbursement of monies by requiring approval by the Surgeon General of the proposed

mental health plan before the money would be distributed. Such provision is inconsistent with the plenary authority argued by the State in this litigation.

Where Congress has created a land trust to be administered by a state for the benefit of certain groups the state owes a duty of loyalty to the beneficiaries. See, e.g., United States v. New Mexico, 536 F. 2d 1324 (l0th Cir. 1976); County of Skamania v. Washington, 685 P.2d 576 (Wash. 1984). In the administration of this trust, the State must treat all the beneficiaries impartially. See, e.g, Brown v. McLanahan, 148 F.2d 703 (4th Cir. 1945); Estate of Toulmin v. United States, 326 F. Supp. 1028 (S.D. Ohio 1971). As a result of these duties, the State may not remove any group as a beneficiary and must provide for necessary services as "the necessary expenses" of the mental health program from the trust before it may allocate any money for a purpose other than the mental health program.

IT IS SO ORDERED.

DATED at Fairbanks, Alaska this 27th day of April, 1988.

MARY E. GREENE
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child and EARL HILLIKER on behalf of themselves and all others similarly situated,	)	FILED in the Trial Courts State of Alaska Fourth District JUN 15 1983
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

No. 4FA-82-2208 CIV

MEMORANDUM DECISION

Plaintiffs filed a complaint in late 1982 seeking a declaration that § 4, ch. 181, 182, Alaska Sess. L. 1978, is null and void. Plaintiffs allege that the legislature, by enacting A.S. 37.14.010-.050, has illegally disposed of lands ceded to the State by the United States under a mental health land grant contained in Public Law 84-830, §202 (1956).

Plaintiffs Vern T. Weiss, et al. ("Weiss et al.") have moved for partial summary judgment against the defendant State of Alaska. Weiss et al.'s motion seeks an order declaring (1) that lands granted to the state under the Alaska Mental Health Enabling Act, P.L. 83-830, 70 Stat. 709, may not be redesignated general grant lands by the Alaska Legislature and that ch. 181 and 182, Alaska Sess. L. 1789, are to that extent null and void under the Supremacy Clause, art. VI, cl. 2, of the United States constitution, and (2) that the lands therefore are subject to a

federal trust. The State has filed a cross-motion seeking to establish the statute's validity.

DISCUSSION

In State v. University of Alaska, 624 P.2d 807 (Alaska 1981) the Alaska Supreme Court discussed the law of public trusts and the powers of the state legislature with regards to land held in public trust. In the University of Alaska case the court held that lands patented to the Territory of Alaska under an Act of 1929 were held in a public trust for the exclusive use and benefit of the [now] University of Alaska.

The contested land grant to the Territory of Alaska at issue herein is one for the benefit of the mentally ill in Alaska. The original language of the grant, no longer codified, is as follows:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefore or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. Formerly 48 USC §46-3, P.L. 84-830 §202 (1956).

Since the language of the original grant clearly creates a public trust, there is no need to imply such a trust as the court did in University of Alaska, supra. Having found such a trust to exist, the question then becomes how to construe its terms.

The 1929 Act (to the University of Alaska) stated with particularity that the land being granted was to be put to the exclusive use and benefit of the University of Alaska. The court construed this language literally and held the state liable for the actual value of the land from which the beneficiary had been deprived. The court also expressly found that the legislature retained the power to dispose of the land held in trust so long as the beneficiary's account was credited with cash representing the actual value of the assets transferred. Finally, the court found that invalidation of the statute under which the legislature had acted was an improper remedy and that a more appropriate remedy would be one for an accounting.

The general policy of Congress when conveying public lands has been to restrict the use or disposition of the lands to ensure that the private sector would not take advantage of the ceded lands to the detriment of the general public. This policy was explained in Lassen v. Arizona, 385 U.S. 458, 463-464 (1967) by the United States Supreme Court:

> "All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories. Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898. The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently

> hoped to prevent such depredations here by requiring public notice and sale. The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands." (footnotes omitted). Lassen v. Arizona, supra.

The State asks this court to differentiate between the trust implicitly created in the University of Alaska case and the trust expressly created in the instant case. The State argues that the trust is not for the exclusive benefit of Alaska's mental health program because P.L. 84-830 §202(e) states in essence that all trust revenues not needed for the "necessary expenses" of the mental health program may be spent on other public projects. This court declines to construe the trust so broadly.

By so holding, this court does not purport to rule that the State of Alaska is powerless to transfer or exchange trust lands. P.L. 84-830 §202(e) specifically allows such a transfer. Rather, the trust is entitled to be reimbursed for the full value of any lands transferred from it to the "pool" of public lands envisioned in A.S. 37.14.050. "to imply a more expansive purpose for the trust than that stated in the Enabling Act is to indulge in a license of construction which Congress intended to prevent." United States v. State of New Mexico, 536 F.2d 1324, 1327 (1976).

Consistent with our Supreme Court's ruling in State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981), the invalidation of A.S. 37.14.010-050 is an improper remedy. Consequently, summary judgment is entered for plaintiffs and defendants are hereby ordered to account for the value of the lands removed from the P.L. 84-830 §202 trust.

Dated at Fairbanks, Alaska, this 14th day of June 1983.

WARREN W. TAYLOR
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child and EARL HILLIKER on behalf of themselves and all others similarly situated,	)	FILED in the Trial Courts State of Alaska Fourth District SEP 14 1983
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	

No. 4FA-82-2208 CIV

JUDGMENT

For the reasons set out in this court's Memorandum Decision, dated June 14, 1983 and filed on June 15, 1983, and pursuant to the stipulation entered into by the parties and attached to this judgment and incorporated herein, this court enters the following judgment.

The Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, established a public trust for the benefit of the mentally ill in Alaska. Under the terms of that Act, the approximately one million acres of land granted to the state was dedicated for the use and benefit of the mentally ill in Alaska, the class of plaintiffs on whose behalf this action has been brought.

In ch. 181 and 182, Alaska Sess. L. 1978, the Alaska State Legislature redesignated lands obtained by the state under

the Alaska Mental Health Enabling Act as general grant lands, effectively removing them from the trust established by the federal legislation and under which the state received title to the lands. Under State v. University of Alaska, 624 P.2d 807, 815 (Alaska 1981), invalidation of ch. 181 and 182, Alaska Sess. L. 1978, is an improper remedy. Instead, the trust is entitled to be reimbursed by the State of Alaska for the fair market value of the mental health trust lands as of July 19, 1978.

Accordingly, IT IS ORDERED:

1. P.L. 84-830, 70 Stat. 709, created a public trust for which the State of Alaska is trustee.

2. Ch. 181 and 182, Alaska Sess. L. 1978, are valid and constitutional insofar as they redesignate as general grant lands the mental health trust lands received by the state under the terms of the Alaska Mental Health Enabling Acts of 1956, P.L. 84-830, 70 Stat. 709.

3. The public trust established by P.L. 84-830, 70 Stat. 709, shall recover from the defendant State of Alaska an amount equal to the fair market value of all lands conveyed from the trust as of the date of conveyance, plus prejudgment interest from the date of each conveyance. For the purposes of this judgment, all lands remaining in the trust as of July 19, 1978, shall be considered as having been removed from trust status by the State of Alaska on that date. The exact amounts shall be determined as soon as may be practicable in accordance with the stipulation of the parties.

4. In calculating the final dollar figure to be included in any final judgment, the state shall receive credit for all appropriations for mental health purposes, including interest at the same rate as is used to compute prejudgment interest from the effective date of each such appropriation. Any disagreement whether a particular appropriation should be credited shall be

determined under the procedures set out in the Uniform Arbitration Act, AS 09.43.180.

5. Pursuant to Civil Rule 54(b), this court finds that there is no just reason for delay and expressly directs the entry of judgment in the manner set forth herein.

JUDGMENT ENTERED this 14th day of September, 1984.

WARREN W. TAYLOR
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES, Plaintiffs, vs. STATE OF ALASKA, Defendant.	)	FILED in the Trial Courts State of Alaska, Fourth District DEC 14 1994

Case No. 4FA-82-2208 Civil

ORDER

On December 6, 1994, final approval was granted for the settlement contained in Chapters 5 and 6, FSSLA 1994, Chapters 1 and 2, SSSLA 1994, Chapter 66, SLA 1991, and the Settlement Agreement signed on June 10, 1994. The following sections of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA

1994, are incorporated into and material to the settlement agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, and 51. Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, is also material to the settlement agreement. In the event the Legislature materially alters any of these legislative enactments, the plaintiffs may seek relief from the judgment dismissing this case, pursuant to Alaska Civil Rule 60(b)(6), and file a new action reasserting all of their claims including their original claims and the claim that the mental health lands trust has not been adequately reconstituted. This dismissal with prejudice will not bar these claims.

Interim deeds conveying reconstituted trust lands to the Alaska Mental Health Trust Authority, created by Section 26 of Chapter 66, SLA 1994 (to be codified as AS 47.30.011(a)), were tendered by the State and accepted by the court on November 4, 1994. Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, appropriates two hundred million dollars ($200,000,000) to the mental health trust fund, which is created by Section 12 of Chapter 5, FSSLA 1994 (to be codified as AS 37.14.031).

The court has been assured that the State will promptly implement the following: (1) delivery of the interim deeds to the Alaska Mental Health Trust Authority upon its request; and (2) payment of the two hundred million dollars ($200,000,000) into the mental health trust fund on December 16, 1994, the effective date for Chapters 5 and 6, FSSLA, as amended by Chapters 1 and 2, SSSLA 1994. The court finds that with recordable conveyances of original trust land and replacement trust land and payments of cash into the trust fund along with creation of the Alaska Mental Health Trust Authority and other program improvements, as required by the Settlement Agreement and the legislation described above, the State will have satisfied its obligations to reconstitute the mental health trust under State v. Weiss, 706 P.2d 681 (Alaska 1985). Failure of the State to

complete its obligations under the settlement in a timely manner will be grounds for plaintiffs to seek relief from judgment.

Therefore, in view of the above IT IS ORDERED that

1. The preliminary injunction issued July 9, 1990 is dissolved.

2. The 1986 mineral closing order entered by this court is vacated. However, the order Temporarily Closing Trust Land to Mineral Location, dated August 15, 1994, remains in effect. All lands designated as trust land pursuant to Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994 are temporarily closed to mineral location until regulations regarding development of mental health trust mineral land are adopted and become effective pursuant to sections 9 and 17 of Chapter 5, FSSLA 1994.

3. The case of Weiss v. State, 4FA-82-2208 Civil, is DISMISSED with prejudice.

If no appeal is taken from the dismissal of this case and the December 6, 1994, decision granting final approval of thesettlement, the dismissal of this action terminates the operation of the lis pendens[1] identified in the attached Exhibit A. See Blake v. Gilbert, 702 P.2d 631, 642 (Alaska 1985), overruled on other grounds, Bibo v. Jeffrev's Restaurant, 770 P.2d 290, 296 n.9 (Alaska 1989). If final approval and dismissal are appealed, the

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[1] The recording of a notice of lis pendens provides constructive notice to purchasers and encumbrancers that their interests may be affected by a pending action affecting the title to or the right of possession of real property described in the notice. AS 09. 45. 940.

lis pendens identified in Exhibit A automatically remain in effect pending a decision on appeal. See id.; AS 09.45.940.

DATED at Fairbanks, Alaska this 13th day of December, 1994.

MARY E. GREENE
Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child and EARL HILLIKER on behalf of themselves and all others similarly situated,	)	FILED in the Trial Courts State of Alaska, Fourth District SEP 5 1984
Plaintiffs,	)	
vs.	)	
STATE OF ALASKA,	)	
Defendant.	)	No. 4FA 82-2208

STIPULATION

The parties acknowledge the following:

1. Most of the major substantive issues in this case have been decided by the Memorandum Decision awarding plaintiffs a partial summary judgment. All parties desire the major substantive issues to be determined by the Alaska Supreme Court, and if necessary the United States Supreme Court, as soon as possible. The parties believe that the valuation of the former mental health trust lands will not be a major point of contention between plaintiffs and the State of Alaska.

2. In order to draft an enforceable final order in this cause, the following information will be prepared by the State of Alaska:

(a) A legal description of all lands selected by the State of Alaska under the Alaska Mental Health Enabling Act, and the current status of such lands

(i.e., whether such selections were patented, tentatively approved, or rejected);

(b) whether such lands, or interests in such lands, have been conveyed or alienated by the state, and if so, the nature and fair market value of the interests so conveyed or alienated;

(c) the fair market value of all mental health lands remaining in the trust on the date when the 1978 Act removing the lands from the trust became effective.

3. The information required in paragraph 2 above cannot reasonably be assembled until approximately March, 1985. The State of Alaska is making a good-faith effort to generate the information.

Therefore, the parties agree and stipulate as follows:

1. The parties desire that a final judgment as to less than all issues in the case be entered by the court at this time, pursuant to Civil Rule 54(b), on the issues upon which the court ruled in its Memorandum Decision dated June 14, 1983 and filed on June 15, 1983.

2. Assuming the trial court's ruling that the ch. 181 and 182, Alaska Sess. L. 1978, is valid is upheld on appeal, the value of the mental health lands shall be computed by determining the fair market value of those lands as of July 19, 1978, the effective date of the 1978 legislation, plus simple interest at 10.5 percent per year as provided in AS 09.30.070. To determine fair market value, the state shall perform the necessary appraisals. Prior to issuing any requests for proposals, selecting any appraisers, or entering into any contracts for appraisals, the state shall permit counsel for the plaintiffs to review the requests for proposals, the list of approved appraisers and the contracts (including the instructions to the appraisers included in the contracts). The appraisals shall be completed by March 15, 1985. The state shall provide to plaintiffs' counsel copies of each appraisal as it is completed, and give plaintiffs' counsel a

reasonable period of time not exceeding 60 days from the date of mailing to file any objection.

3. In addition to appraising the fair market value of former mental health lands converted to general grant land status by the 1978 legislation, the state shall develop estimates of the value of all state mental health land conveyances, leases, or material sales to third parties before July 19, 1978. These estimates shall be based on appraisals of and revenues from mental health lands performed in conjunction with the creation of those third party interests before July 19, 1978. All such estimates and the supporting papers shall be submitted to counsel for plaintiffs on or before May 15, 1985, and plaintiffs shall file any objections to the same within 60 days of mailing.

4. In calculating the final dollar figure to be included in any final judgment, the state shall receive credit for all appropriations for mental health purposes, including interest at the same rate as used for prejudgment interest from the effective date of each appropriation. Any disagreement whether a particular appropriation should be credited shall be determined under the procedures set out in the Uniform Arbitration Act, AS 09.43.180.

5. Neither party will seek an order staying proceedings under the Civil Rule 54(b) judgment entered by the superior court, or with respect to any matters addressed in this stipulation and agreement.

6. In the event of any appeal or cross-appeal of the Civil Rule 54(b) judgment entered by the court in this action, neither party will initiate proceedings to require the posting of a cost bond.

7. If the state adheres to the requirements of this stipulation and agreement, the state shall be deemed to have complied with the discovery request served on the state by the plaintiffs and the court's Order Compelling Answer to Interrogatory dated December 15, 1983 and filed December 16,

1983. It is understood that plaintiffs' rights to initiate further discovery proceedings are not prejudiced by this stipulation.

8. Motions for costs and attorney fees are reserved until a final money judgment is entered in this action.

STEPHEN C. COWPER Attorney for Plaintiffs Dated: Aug. 4, 1984	NORMAN C. GORSUCH ATTORNEY GENERAL By G. Thomas Koester Attorney for Defendant Dated: Aug. 30, 1984

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, minor child and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated, ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC and H.L., M.K. and ALASKA ADDICTION REHABILITATION SERVICES, Plaintiffs, vs. STATE OF ALASKA Defendant	FILED in the Trial Courts State of Alaska Fourth District JUN 10 1994

Case No. 4FA-82-2208 Civil

SETTLEMENT AGREEMENT
AND
STIPULATION TO TERMS OF DISMISSAL

WHEREAS, the state and the plaintiffs and plaintiff-intervenors have engaged in litigation since 1982 over numerous disputes relating to the trust established by the Alaska Mental Health Enabling Act of 1956, including litigation over proposed settlement terms incorporated in Ch. 66 SLA 1991; and

WHEREAS, third-party intervenors Alaska Center for the Environment, et al., and Marathon and UNOCAL have intervened to challenge proposed settlement terms incorporated in Ch. 66 SLA 1991; and

WHEREAS, SCS CSHB 201 (FIN)("HB 201") and SCS CSHB 371 (FIN) ("HB371") include terms proposed as a settlement to resolve this litigation which do not become effective until dismissal of this action; and

WHEREAS, the state, plaintiffs, and intervenors (collectively "parties") seek to set forth the full terms of settlement and the manner in which they intend to implement it so as to obtain judicial approval of the settlement and dismissal of this action pursuant to Alaska Civil Rule 23(e);

NOW THEREFORE, the parties, through counsel, hereby stipulate and agree to the following terms of settlement of this action.

I

BASES OF SETTLEMENT

1. Dismissal with prejudice of the plaintiffs' claims as provided in part VI of this agreement is made in consideration of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51, of HB 201, Sections 1 and 2 of HB 371, and the terms of this agreement, and form the bases of the settlement. The provisions of HB 291 and HB 371:

(a) reconstitute the trust established by the Alaska Mental Health Enabling Act of 1956 with a combination of original and substitute trust land totaling approximately 930,000 acres;

(b) provide a cash payment of $200 million dollars to be deposited into a newly created mental health trust fund which the plaintiffs consider as additional compensation for the land or interests in land not returned to trust status;

(c) establish a Trust Authority to oversee trust assets, administer the mental health trust income account, and ensure an integrated, comprehensive mental health program for the state;

(d) require the principal of the trust fund to be retained perpetually for investment, and sale proceeds, royalties, and other income from the management of trust land which is attributable to principal to be deposited into the fund;

(e) authorize the Trust Authority to spend net income of the fund and income from the management of land not otherwise attributable to principal in fulfillment of the Authority's purpose to ensure an integrated, comprehensive, mental health program; and

(f) make effective certain improvements in the state's mental health program enacted under Ch 66 SLA 1991 including the process of establishing a coordinated and comprehensive mental health program for the state of Alaska.

II

IDENTIFICATION OF LAND PROVIDING FOR TRUST RECONSTITUTEION

1. The parties agree that the land negotiated as land to be designated as mental health land pursuant to Section 40(a)(1)&(2) of HB 201 consists of approximately 930,000 acres of original and replacement trust land identified on the lists of "Original Mental Health Land To Be Designated As Trust Land, April 28, 1994" and lists of "Other State Land To Be Designated As Trust Land, April 28, 1994" attached hereto as Attachment A. This land is generally described as follows:

(a) Original Trust Land (Fee Estate):

Approximately 435,000 acres of original trust land, which include approximately 108,894 acres of unleased coal areas, approxi-

mately 119,213 acres thought to have mineral potential, approximately 48,244 acres of commercial forest resources in the Cape Yakataga area, and approximately 158,000 acres of land tracts of various sizes. Of the 435,000 acres, approximately 212 acres are subject to long term leases, approximately 36,440 acres are subject to existing mining claims, approximately 1,095 acres are derived from the unoccupied areas of state facilities, and approximately 4,634 acres will be reconveyed by municipalities. In addition to the 435,000 acres, there are more than 20,000 acres of Alaska Mental Health Enabling Act entitlements the federal government has yet to convey.

(b) Original Trust Land (Mineral Estate Only): The oil and gas interests in the mineral estate of approximately 78,566 acres within the Cook Inlet geologic basin, the surface of which has been conveyed to third parties or is within state legislatively designated areas; the mineral estate in 19,138 acres conveyed to municipalities; and the mineral estate of 35,771 acres in the Matanuska Valley Moose Range.

(c) Substitute Trust Land (Fee Estate): Approximately 4,252 acres in the Thorne Bay area selected for timber value; approximately 1,722 acres that are part of the Fort Knox mining project selected for its mineral value; approximately 65,000 acres selected for their mineral potential; and approximately 40,943 acres selected for their surface value, consisting of 1,169 acres of parcels within subdivisions and 39,774 acres of other land tracts of both small and large size.

(d) Substitute Land (Mineral Estate Only): Approximately 217,000 acres of mineral estate selected for their mineral potential near Fairbanks and Haines; and approximately 25,720 acres of oil and gas interests within the Cook Inlet geologic basin in the Kenai Peninsula and the lower Susitna Valley.

(e) The parties further agree that the reasons for selecting the lands as described in subsections (a) – (d) above are given merely to categorize and describe the lands. In so doing,

neither party makes any representations as to the revenue producing capability of any parcel of such land.

III

PROVISIONS FOR TECHNICAL CORRECTIONS TO LIST OF LANDS

1. The parties agree that any omissions, overinclusions, inconsistencies or errors now known or discovered in the lists of original and substitute trust lands transferred to the trust pursuant to Sections 40(a)(1)&(2) of HB 201 shall be resolved as follows:

(a) The State and the plaintiffs, and the State and the Trust Authority, once established, shall identify to the other party any omissions, overinclusions, inconsistencies or errors in the lists of original and substitute trust lands as soon as such problems are known or discovered, along with such information or other explanation as is necessary to determine the reason for the claimed omission or error.

(b) Any errors or omissions to the legal descriptions of the lists of original and substitute lands submitted pursuant to Sections 40(a)(1)&(2) of HB 201 necessary to accomplish the intent of the parties shall be corrected by Department of Natural Resources (DNR) pursuant to the authority granted DNR under Sec. 17 of HB 201.

(c) Any additions, deletions, or substitutions to the list of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) necessary to accomplish the intent of the parties shall be obtained by legislative amendment or by transfer, exchange, or conveyance.

(d) As of the date of executing this agreement, the parties have identified in Attachment B the initial omissions, overinclusions, or substitutions to the lists of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) which they agree to correct pursuant to the terms of (b) and (c) above.

IV

PROVISIONS REGARDING TRANSFER OF LAND TO TRUST AUTHORITY

1. Transfer of Land by Quitclaim Deed And Delivery of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Sections 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this action, the deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority to complete the preparation of recordable deeds for delivery to the Authority as soon as practicable after dismissal.

2. Authorization to Convey State Land as Substitute Land. The State warrants that it has the legal authorization necessary to convey the land or interest in land designated as mental health lands pursuant to Section 40 (a)(2) of HB 201. To the extent that such authorization is subject to a pending conveyance or patent from the federal government, and such conveyance or patent is different than that set forth in Section 40(a)(2) of HB 201, the State shall compensate the trust for the difference with other land (or interests in land) of similar type or character and equal value and similar revenue producing potential, unless otherwise agreed by the Authority and DNR.

3. Encumbrances. Land conveyed to the trust pursuant to Sections 40(a)(1)&(2) of HB 201 remains subject to valid existing encumbrances or valid existing interests as provided in Section 40(b) of HB 201. The Authority may challenge the valid-

ity of any encumbrance or interest. The Authority shall be bound by and be able to enforce the terms of valid encumbrances and valid interests.

4. Hazardous Substances. (a) If it is discovered that any hazardous substance or substances came to be located on or discharged from a parcel of land conveyed to the Trust Authority under Sections 40(a)(1)&(2) of HB 201 such that the affected parcel is not in compliance with any federal, state, or local environmental laws, the issue shall be resolved as provided in this section.

(b) If the hazardous substance came to be located on or discharged from a parcel of original mental health trust land after being conveyed to the state under the Enabling Act but prior to conveyance to the Trust Authority, or on a parcel of replacement land at any time prior to conveyance to the Trust Authority, the issue shall be resolved in such manner as the Trust Authority and DNR mutually agree. If the Trust Authority and DNR cannot reach agreement, the Trust Authority in its discretion may elect to retain the affected parcel as trust land or tender it back to DNR. If the Trust Authority tenders an affected parcel to DNR, the sole remedy is that DNR in its discretion shall either cause such affected parcel to be remediated to comply with such environmental law or laws or exchange the affected parcel for other land (or interests in land) of equal value and similar revenue-producing potential valuing and determining the revenue producing potential of the affected parcel without the hazardous substance. If such a replacement exchange occurs, the Trust Authority shall reconvey the affected parcel to the state. If the Trust Authority tenders an affected parcel to DNR under this subsection, the state shall, at its expense, appear for, defend, and hold harmless the Trust Authority from any claim or action asserted by a third party based on the presence of any hazardous substance located on the affected parcel prior to its remediation or the replacement exchange of such land.

(c) If the hazardous substance came to be located on or discharged from a parcel of original mental health trust land

before being conveyed to the state under the Enabling act, or for both original mental health trust land and substitute land, after conveyance to the Trust Authority under Sections 40(a)(1)&(2) of HB 201, responsibility shall be allocated between the Trust Authority and the state as provided by applicable law.

(d) Nothing in this section is intended to limit the Trust Authority's or the state's rights to assert any claims or defenses available to them with respect to third parties.

5. Conveyances Recorded at State Expense. All conveyances, releases of interest, cancellation of lis pendens, or other documents required by the terms of this agreement shall be recorded at the state's expense in the recording district in which the land is located.

6. Land Closed to Mineral Entry. All parties to this agreement shall jointly move the court to continue the mineral closing order on original trust land and extend such order to substitute land, such order or orders to be effective until the regulations required by HB 201 become effective. Any interest claimed or granted in contravention of such an order or orders are void.

7. Access to Trust Land. The State has reserved or will reserve legal rights-of-way and easements for access and for utility services to trust land. The rights-of-way and easements shall be consistent with state and federal law, and shall be located to assure adequate and feasible access for the purposes for which the right-of-way or easement is intended. Costs associated with maintaining easements and rights-of-way will be addressed in the regulations promulgated under HB 201. Nothing in this section requires the state to provide access across non-state land.

8. Competing Native Allotments. In the event original mental health land to be returned to the trust under Section 40(a)(1) of HB 201 is conveyed to the BLM by the State because of a valid Native Allotment, DNR will convey to the Authority the land conveyed to the state by the federal government under the Enabling Act to replace the land subject to the Native allot-

ment, consistent with the annual priority list filed with the BLM by DNR.

9. Conveyances of Remaining Mental Health Land Selections. The Trust Authority will prioritize remaining mental health selections and provide this listing to DNR for incorporation in the annual conveyance priority list filed with the Bureau of Land Management. DNR will consult with the Authority when it determines the appropriate ranking of the mental health selections among other state conveyance priorities. DNR shall assist the Authority in its efforts to ensure that annual conveyance priorities are completed in a timely manner by BLM.

V

TRUST FUND AND TRUST AUTHORITY

1. Trust Authority as Fiduciary. In exercising its powers, duties and responsibilities as trustee the Trust Authority is under a fiduciary obligation as set forth in AS 37.14.007 and 37.14.009, and may employ consultants, accountants, attorneys and staff in the exercise of its responsibilities. The Authority shall annually review the allocation of proceeds, income or other money received from the management of trust land to assure proper attribution to principal and shall annually report on the management of trust assets and the development of a comprehensive mental health program for the State.

2. Trust to Receive Gifts. The parties' intent in establishing the mental health trust fund and mental health trust income accounts under Sections 12, 15 & 16 of HB 201 is that the trust may receive and the trust income account may be properly used by the Authority for soliciting gifts, bequests and contributions for a purpose consistent with the funding of an integrated comprehensive mental health program for the State.

3. Records to be Available to Authority. The records, surveys, reports and other data regarding trust land and proposed substitute land accumulated by the plaintiffs' Mental

Health Lands Project are the property of the state and shall be available for inspection by the Authority at all times, consistent with applicable law. The records, surveys, reports and other data of DNR regarding management of trust land shall be available for inspection by the Authority at all times, consistent with applicable law. Unless otherwise agreed by the Authority and DNR, all of the records discussed herein shall be located in the unit established to manage trust land pursuant to Section 22 of HB 201.

4. Administration of Trust Income. The transfer of the net income of the fund to the income account by the Permanent Fund Corporation is not discretionary and is required by HB 201. Similarly, the allocations and transfer of income from trust land to the trust fund and income account by DNR is not discretionary and is also required by HB 201. Except for the administrative expenses of the Authority subject to the Executive Budget Act under Section 16 of HB 201, and to the fullest extent consistent with the Alaska Constitution, the Trust Authority may use the money in the income account for the purposes authorized in Section 16 of HB 201 without, and free of further legislative appropriation. The Trust Authority shall use the money in the income account in fulfillment of the Authority's purpose to ensure an integrated, comprehensive mental health program for the State.

5. Income and Proceeds Account. It is the intent of the parties that the money deposited in the mental health trust income and proceeds account prior to December 15 will be deposited in either the mental health trust fund or the mental health trust income account as appropriate. To the extent possible, the state will undertake this allocation administratively. If legislation is required to accomplish this result, the parties agree to use their best efforts to seek and obtain passage of such legislation.

5. Development of Contracts, Operational Procedures and Regulations. The Authority and DNR shall negotiate in good faith and shall contract for the management of trust assets upon terms that are mutually agreeable to the Authority and DNR, and which reflect the duties and responsibilities imposed on the Authority and DNR pursuant to HB 201. The parties rec-

ognize that the details of contracting procedure, management of trust land, and other operational policies are left to be resolved under HB 201 by the Authority, DNR and other entities through a cooperative and public rulemaking process. The parties' understanding and intent on how this process will work is set forth in Attachments C and D, which the parties acknowledge are not contractual but are expressions of intent and interpretation only. To facilitate the development of a management unit, and policies and procedures reflecting the intent of the parties in entering into this agreement prior to the effective operation of the Authority, DNR agrees to consult with a transition team of representatives from the beneficiary community to advise and deliberate with DNR and other affected state agencies.

VI

SETTLEMENT, DISMISSAL AND MODIFICATION

1. Seeking Approval of Settlement. The parties agree to expeditiously file any motions, memoranda, proposed orders or other papers and to participate in any hearings necessary or convenient to obtaining preliminary and final approval from the superior court of the settlement embodied in HB 201, HB 371 and this agreement.

2. Construction. All parties have participated in drafting this agreement and agree that any canon of construction construing ambiguities against the drafter does not apply.

3. Severability. If any provision of this agreement, or any settlement provision in HB 201 or HB 371, is declared invalid for any reason, such a finding does not affect the validity of other provisions herein.

4. Attorney Fees. Attorney fees and costs shall be awarded and paid as determined by the court. Paragraph 6(e) requires dismissal of appeals to the Supreme Court because they are moot. The parties request that attorney fees be awarded as if the orders had not been appealed.

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, and acknowledge that the trust is reconstituted in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985). The provisions of Sections 2 through 9, 12 through 40 (a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and acknowledged that the trust is reconstituted. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims. In light of the dismissal of each parties' claims, no modification of this agreement may be made except in writing signed by all the parties. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

6. Settlement and Dismissal. Upon final approval of the settlement embodied in HB 201, HB 371 and this agreement by the court pursuant to Alaska Civil Rule 23, within the time frame set forth in HB 201 and HB 371 for the settlement provisions to become effective, the parties stipulate and agree to the entry of an order or orders:

(a) Approving the terms of this agreement and the settlement provisions of HB 201 and HB 371;

(b) Dismissing Weiss et al. v. State, 4FA-82-2208 Civil;

(c) Dismissing with prejudice all class claims, including without limitation those of plaintiffs and plaintiff-intervenors, known or unknown, asserted or unasserted, that arise on or before the date of dismissal and arise from or relate to the 1978 redesignation legislation, any other actions taken by the state since statehood in managing and administering the land granted to the state under the Mental Health Enabling Act or the proceeds generated from that land, or any other actions taken by

the state since statehood in managing and administering the trust created by the Alaska Mental Health Enabling Act;

(d) Requiring plaintiffs to dismiss with prejudice all other claims asserted by them, whether in the form of intervention, consolidation, appeals, cross-appeals, or amicus, in all other pending litigation, arising out of the state's administration of the trust established by the Enabling Act since statehood including Richards v. State, 4FA-93-2195 Civ.; Kashwitna Farms, Harry and Consuelo Wassink v. State and Hawkins v. Wassink, 3AN-88-0056 Civ. consolidated; Snowcrest Farms, Ray Hendershot and Royce Johnson, Falcon Lake Dairy, Elvin and Dorothy Johnson, Kashwitna Farms, Harry and Consuelo Wassink, v. State, Department of Natural Resources, Supreme Court S-6042; James White v. Commissioner, Alaska Department of Natural Resources, 3AN-93-5470 Civ.; Vern T. Weiss et al. v. Usibelli Coal Mine Inc. and State of Alaska, Supreme Court No. S-6125; Appeal of Vern T. Weiss et al., IBLA No. 91-224 (Tyonek); Vern T. Weiss et al. v. Secretary of the Interior of the United States of America, Tyonek Native Corporation, and Cook Inlet Region, Inc., A94-072 Civ. (D. Alaska);

(e) Approving this stipulation of plaintiffs, state and third-party intervenors Marathon and UNOCAL, and Alaska Center for the Environment, et al., to move for the dismissal, as moot, all pending appeals and cross appeals arising out of this action.

(f) Dissolving the preliminary injunction issued in this action on July 9, 1990; and

(g) Expunging the Renotice of Lis Pendens.

(h) The orders requiring dismissal of plaintiffs claims in subsections (b) through (g) above shall only be entered upon a finding that conveyances of land and payments of cash required by HB 201 and HB 371 have or will be made to the satisfaction of the court.

7. Relief from Judgment. By their terms, the settlement provisions in HB 201 and HB 371 do not become effective unless this action is first finally and timely dismissed, with any appeals timely resolved in favor of dismissal. If the court gives final approval of the settlement embodied in HB 201, HB 371 and this agreement, and enters the order or orders dismissing this action (as set forth in paragraph 65 (a)-(g) above) and if, thereafter, the timeliness requirements of HB 201 and HB 371 are not met, such that their settlement provisions do not become effective, any party may seek relief from such order or orders pursuant to Alaska Civil Rule 60(b)(6). The failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment and no party shall oppose such a motion.

DATED this ____ day of June, 1994, at Anchorage, Alaska.

LAW OFFICES OF
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Attorney for Plaintiffs
Vern Weiss and Earl Hilliker

Unsigned

LAW OFFICES OF
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By Philip Volland June 10, 1994

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By Jeffrey L. Jessee June 10, 1994

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Unsigned

BRUCE M. BOTELHO
Attorney General
State of Alaska

By Nathaniel B. Atwood June 10, 1994

ATTACHMENT C
TO THE
SETTLEMENT AGREEMENT
AND
STIPULATION TO TERMS OF DISMISSAL

LAW OFFICES OF
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May 27, 1994

Via Fax to 277-8235
Julian L. Mason
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1130 W. 6th Avenue, Suite 100
Anchorage, Alaska 99501

Re: Weiss v. State

Dear Julian:

Certain questions have arisen among beneficiaries which center on the functions and responsibilities of the Authority. Although you and I, and Mark Davis and Dick Thwaites have discussed these, it would be helpful if the state would respond to these questions so that beneficiaries can evaluate the proposed settlement.

1. What will be the nature of the contractual relationship between DNR and the Authority? We have assumed

from the scheme of the legislation that the Authority will use a Reimbursable Services Agreement (RSA) to pay DNR's management costs from the trust income account. Is the Authority obligated to contract with DNR if it proposes fees and overhead which are not reasonable? Also, what remedy does the Authority have if it discovers that DNR fees or expenses are unreasonable? What is the process of enactment of regulations? Can the Authority itself propose regulations for DNR to consider? What are DNR's responsibilities when it "consults" with the Authority? Can DNR simply ignore the Authority's view of proper management of trust land? Can DNR propound regulations under the terms of HB 201 which are not supported by the Trust Authority?

2. What is the state's view of the contractual relationship between the Authority and the Permanent Fund Corporation (PFC)? We have also assumed that the costs of PFC management will be paid from the trust income account by the Authority through an RSA. Can the Authority require the PFC (Through its RSA, for example) to establish a special position dedicated to management of the trust fund who would report directly to the Authority? Is the Authority obligated to contract with the PFC if management fees are not reasonable in light of trust management fees in the private sector? If there is a showing that PFC fees are substantially above those in the private sector, does the Authority have the options of revising or terminating the contract? Can the Authority terminate a contract with the PFC if the Permanent Fund ceases to be a purely investment-oriented fund and adopts investment goals that are no longer compatible with trust management (e.g., high risk, speculative ventures that might nonetheless be seen as fuel for Alaska's economy)? Is it anticipated that the funds held by the PFC for the Authority will be commingled with other investments in the Permanent Fund? If this occurs, how can proper accounting be assured.

3. Will the Authority be able to review DNR and PFC records to assure that there has been proper attribution between income and principal? If the Authority were to discover improper attribution between income and principal, what reme-

dies are available to the Authority? Does the state concur that the Authority might employ its own independent counsel to remedy such a situation?

4. Will the Authority be able to request from DNR and the PFC annual reports on the management of trust assets which can be given to beneficiaries, the legislature, and the governor to assure proper trust management? We presume such records would be public documents. Does the state concur with this?

5. Will the state defend, without charge to the Trust Authority unless otherwise agreed, challenges to DNR's rule-making, and legal costs associated with trust ownership and with DNR land management?

6. Does the state agree that the land records generated by the plaintiffs' Mental Health Lands Project are properly the records of the Authority which can be used to assist proper land management decisions?

7. Does the state agree that the intent of Sec. 15 of SCHB 201 is to allow the trust fund to solicit gifts and bequests for a purpose "consistent with the funding of an integrated comprehensive mental health program"? As you may recall from Dick Thwaites' comments, this clarification makes it clear that the trust fund can be viewed as a "special needs trust" to which bequests can be made which allow beneficiaries to receive greater Medicaid benefits.

8. Is the state willing to propose a timetable for the nomination of Authority board members, selection of the DNR trust management unit, and promulgation of regulations, assuming approval of the settlement?

9. We also believe that the Authority is empowered, through its chief executive officer, to hire its own employees and consultants (see, AS 47.30.026 as enacted by Sec. 26 of Ch. 66 SLA 1991). Does the state concur that the size and composition

of the Authority's staff is up to the Board of the Authority acting through its chief executive officer?

I believe that some of these questions can properly be addressed in a settlement agreement. Although I hoped to finish a draft of an agreement by today, I thought it would facilitate completion of the agreement to await the state's response to this letter. I hope the state's response can be given next week since it will assist greatly in the ability of beneficiary representatives to assess the proposed settlement.

Sincerely,

RICE, VOLLAND and GLEASON P.C.

By: Philip R. Volland

ATTACHMENT D
TO THE
SETTLEMENT AGREEMENT AND STIPULATION TO
TERMS OF DISMISSAL

ASHBURN AND MASON
Lawyers
A Professional Corporation
1130 West Sixth Avenue, Suite 100
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June 3, 1994

Philip R. Volland, Esq.
Rice, Volland & Gleason
211 H Street
Anchorage, Alaska 99501

Re: Mental Health Lands

Dear Philip:

Commissioner Noah and Attorney General Botelho authorized me to respond to the questions in your letter dated May 27, 1994. Our intent is to tell you how we are preparing to interpret and administer HB 201. We are assuming that all of its provisions will become effective. We begin by outlining the conceptual approach that we are taking.

DNR's overall management principle is that it does not plan to take action concerning trust land without consultation with the Authority. While DNR is charged by statute with management responsibility and must exercise its independent judgment, it will make every reasonable attempt to obtain prior approval of the

Authority before action is taken. DNR will view the Authority as a client agency and will develop a working relationship which permits quick decisions by the Authority on routine matters and provides for appropriate deliberation on more complex questions.

This is consistent with our view that the settlement of this case will mark a dramatic change from the current adversarial relationship between the mental health community and the State. We have no intention of dealing with the Trust Authority with a litigation mentality. It is in all of our interests to approach the settlement as establishing a cooperative relationship between the State and the mental health community represented by a new state agency, the Trust Authority. While there are sometimes disputes between other state agencies, some of which have the power to sue and be sued, these disputes are almost always resolved without litigation. We anticipate the same will be true with the Trust Authority's relationship to the rest of state government. It is with that expectation and in that spirit that we answer your questions.

1. Nature of Contractual Relationship Between DNR and the Trust Authority.

A. Contract. The Authority is obligated by HB 201 to contract with DNR, but we do not believe that DNR can compel terms which are unreasonable. We agree with you that using an RSA or a substantially similar arrangement is appropriate.

DNR envisions a system in which each year the department will prepare a specific work plan outlining the tasks which will be undertaken in the coming year. A cost proposal will accompany the work program. DNR and the Authority will then work together to agree on the scope of work and the resulting cost. To the extent agreement cannot be reached, there are two opportunities to resolve the matter: (1) OMB makes up the governor's budget for submission to the legislature; and (2) the legislature enacts the State's budget, which includes both the Authority's and DNR's authorizations to pay administrative costs. Both provide an opportunity for the Authority to advocate its view of

what would be appropriate staffing and costs for DNR's management services.

There is no need for a remedy with respect to the "reasonableness" of the costs and fees agreed to in an RSA because the RSA forms the basis for that year's budget, staffing pattern, etc. A prior year's experience as to "reasonableness," however, will certainly play a role in determining the terms of the next year's RSA.

As to specific expenses, there is no obligation to pay for services not delivered or for expenses that exceed the scope of the RSA. If the Authority wants more or less work, DNR will comply. The normal practice with RSAs is that disputes are prevented by providing for prior approval of unusual or potentially arguable expenses (travel, etc.). If disputes do arise, they normally are negotiated between the two agencies involved. Litigation, of course, is a potential ultimate remedy, but it is very unlikely as the nature of RSAs and the associated reporting requirements minimize the potential for disputes and the dollar amounts that might be the subject of such disputes.

B. Regulations. In theory, DNR could propound regulations not supported by the Authority, but that would be confrontational and disputatious, and is not DNR's plan. DNR intends to work closely with the Trust Authority to develop the regulations. The regulations, of course, must in any event be consistent with the State's obligations under the Enabling Act.

C. Management. "Consult" means to seek the advice of and to deliberate with the Authority, and DNR intends to do those things in good faith. DNR cannot simply ignore the Authority's view of proper trust management. The best interest finding requirement of AS 38.05/035 will apply to management of trust land, a part of which will include addressing how the proposed action is consistent with the trust principles of the Enabling Act. The Authority's views will be discussed and taken into account as part of the finding. While DNR must ultimately

exercise its independent judgment about management (just as a private trustee must exercise his or her best judgment despite the beneficiary's contrary views), DNR has no intention of ignoring the Authority's views.

2. The Authority and the Permanent Fund Corporation.

The Permanent Fund is a large, highly diversified trust fund managed conservatively. AS 37.13.300(b)(5) provides for the PFC to transfer to the Authority the "net income" attributable to the trust fund. The pro rata administrative cost attributable to the trust fund will already have been taken into account when the net income is transferred to the Authority, and the cost of management need not be addressed in the contract unless the Authority wants to pay the PFC to provide additional services. The PFC has informed us, however, that it does not contemplate contracting to provide services in addition to those required by the statute.

We do not believe that the PFC can compel the Authority to contract with it on unreasonable terms. We note, however, that for 1993, the Permanent Fund had average assets of approximately $14.8 billion and total expenses of approximately $14.9 million, for an expense ratio of only 0.10 percent.

Your question about termination of the contract with the PFC incorrectly assumes that the PFC may unilaterally change the fund's long-range investment policy. This is not correct. Legislation changing the statutes governing the utilization of the Permanent Fund would be required and, to the extent that would conflict with the State's trust obligation under the Enabling Act, would no doubt include removal of the trust fund from management by the PFC. In addition, HB 201 requires that the PFC consult with the Authority before the PFC changes its long-range investment policy. AS 37.13.300(b)(4). We view the problem suggested by this question as remote.

3. Attribution Between Income and Principal - DNR and PFC Records Review.

The Authority will be able to review DNR records and, we assume, PFC records for proper attribution of principal and income. That issue, however, is really an administrative adjustment to determine where trust account money should go - the trust fund or the income account. In either case, the money belongs to the trust. The practice in other contexts (e.g., the North Slope Borough/NPRA fund case) is that improper allocations are simply accounted for by subsequent adjustments to allocations as new income comes in. The Authority could employ independent counsel to remedy the situation, but that would not be necessary unless there were a fundamental disagreement about the governing law.

4. Annual Reports.

DNR envisions that it will give the Authority an annual report on management of trust assets which can be a public record subject to one caveat. Some types of land data (e.g., geologic data developed by third parties) are confidential by law. Various attorney general opinions establish the parameters for sharing such information with state agencies requiring access to the information. We believe, based on those attorney general opinions and Judge Greene's earlier decision, that the Authority would be an agency entitled to that information. If the Authority wants to make DNR's report public, it should be structured not to disclose statutorily confidential data.

The PFC contemplates providing monthly financial reports to the Authority and an audited annual report, similar to what it currently prepares for the Science and Technology Foundation, which is more than what is required under AS 37.13.300(b)(2) and (3).

5. Defense Costs.

There are too many variables to give a simple "yes" or "no" answer. In the absence of specific provisions in an RSA

with DNR, however, we envision that general trust law principles would apply: If the costs are properly attributable to trust management, the trust pays; if not, the State pays.

Land Records.

We agree that the records are State records which can be used to assist in making proper land management decisions. Because we do not have the records, we cannot comment on their accuracy or the extent of their usefulness. The records will be fully available to the Authority, but our belief is that they should be maintained by the DNR trust unit.

6. Solicitation of Gifts and Bequests.

Yes.

7. Timetable for Authority Board Member Nominations, etc.

Yes. DNR has started setting up the trust unit and is beginning to develop the 1995 work program as described in answer No. 1.

8. Hiring of Staff by Authority.

Yes, but subject to gubernatorial and legislative oversight through application of the Executive Budget Act to the Authority's administrative expenses. The potential for trust income to be expended primarily on a large bureaucracy was a major concern of Senators Rieger and Kelly, and that oversight was the "price" of their support for the bill.

I believe these answers respond fully and fairly to your questions,, but we will be happy to elaborate if questions remain.

Very truly yours,

ASHBURN & MASON

By: Julian L. Mason

Appendix J
Pertinent Portions of Alaska Statutes (AS)

AS 38.05.801 Management of Mental Health Trust Land.

(a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).

(b) Subject to (a) of this section, the department

(1) shall manage mental health trust land under those provisions of law applicable to other state land;

Section 41, Chapter 5 First Special Session Laws (FSSLA) of Alaska, 1994.

* Sec. 41. CONFIRMATION AND RATIFICATION OF CONVERSION OF CERTAIN ORIGINAL MENTAL HEALTH LAND TO GENERAL GRANT LAND, CONTINGENT CONVERSION OF CERTAIN ORIGINAL MENTAL HEALTH LAND TO GENERAL GRANT LAND, AND CONFIRMATION AND RATIFICATION OF ACTIONS TAKEN WITH RESPECT TO CONVERTED LAND.

(a) Except for the land described in sec. 40 of this Act,

(1) the conversion to general grant land by sec. 3(a), ch. 181, SLA 1978, and sec. 1(a), ch. 182, SLA 1978, of all land obtained by the state under the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956), and not listed in "Original Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994," located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska, is confirmed and ratified; and

(2) land patented to or approved for patent to the state under the Alaska Mental Health Enabling Act after July 1, 1978, and not listed in "Original Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994," located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska, is redesignated as general grant land if it was not converted to general grant land by sec. 3(a), ch. 181, SLA 1978, and sec. 1(a), ch. 182, SLA 1978.

(b) The land affected by this section includes the land listed in "Original Mental Health Land Not To Be Returned to Mental Health Trust Status, April 28, 1994," located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

(c) All dispositions and uses of the land identified under (a) of this section, including without limitation the creation by the state or the transfer by the state of an interest in the land or the designation of the land as part of a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range are confirmed and ratified.